83-1115

No. 83-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HERMAN Y. KREZDORN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. DOES A PRESUMPTION OF VINDICTIVENESS ARISE FROM A PROSECUTOR'S ADDITION OF A CONSPIRACY CHARGE IN A SUPERSEDING INDICTMENT RETURNED AGAINST A DEFENDANT AFTER THE DEFENDANT SUCCESSFULLY APPEALS FROM HIS CONVICTION ON THE INITIAL SUBSTANTIVE COUNTS BECAUSE OF THE IMPROPER ADMISSION OF EVIDENCE?

II. IF A PRESUMPTION OF PROSECUTORIAL VINDICTIVENESS IS CREATED BY THE ADDITION OF CHARGES FOLLOWING A SUCCESSFUL APPEAL, DOES A FINDING THAT THE PROSECUTOR DID NOT INTEND TO INCREASE THE AMOUNT OF THE DEFENDANT'S PUNISHMENT SUFFICE TO OVERCOME THE PRESUMPTION EVEN THOUGH: (1) ALL FACTS FORMING THE BASIS OF THE ADDED CHARGES WERE KNOWN TO THE PROSECUTOR AT THE TIME OF THE ORIGINAL CHARGING DECISION, AND (2) THE PROSECUTOR ADMITS THAT THE NEW CHARGES WERE ADDED SOLELY IN ORDER TO MAKE ADMISSIBLE THE VERY EVIDENCE WHOSE ERRONEOUS ADMISSION CAUSED THE INITIAL CONVICTION TO BE REVERSED?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

HERMAN V. KREZDORN,
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v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on November 10, 1983.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit (en banc) are reported in United States v. Krezdorn, 718 F.2d 1360 (5th Cir. 1983) (en banc), and are attached hereto as Appendix A. The prior Fifth Circuit panel opinion is reported in United States v. Krezdorn, 693 F.2d 1221 (5th Cir. 1982), and is attached hereto as Appendix B. The findings of fact and conclusions of law by the district court are unreported; they are attached hereto as Appendix C. The decision in Petitioner's prior, related appeal is reported in United States v. Krezdorn, 639 F.2d 1327 (5th Cir. 1981), and is attached hereto as Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1983. This petition for writ of certiorari is filed

within sixty days after that final judgment. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

> "No person shall...be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner, Herman V. Krezdorn, a United States Immigration Inspector in Eagle Pass, Texas, was indicted in February of 1979 on five counts of falsely making and forging the signature of another inspector on the applications of five non-resident aliens for Mexican border crossing cards, in violation of 18 U.S.C. § 1426(a). Petitioner pleaded not guilty.

At trial, the district court directed a verdict of acquittal on one of the counts; Petitioner was found guilty by the jury on the remaining four counts.

On appeal, the Fifth Circuit held that evidence of 32 other similar alleged forgeries by Krezdorn had been admitted erroneously; the court rejected the Government's contention that the alleged extraneous offenses were admissible to show a "plan" under Rule 404(b), Federal Rules of Evidence. United States v. Krezdorn, 639 F.2d 1327, 1331 (5th Cir. 1981 ("Krezdorn I"). In a footnote, the court added: "The existence of a plan would be directly at issue in, for instance, a conspiracy charge." Id. at 1331, n. 7. The court reversed the convictions and remanded the case for a new trial on the four forgery charges.

Prior to retrial, the Assistant United States Attorney obtained a superseding five-count indictment charging Petitioner with the same four alleged forgeries for which he had previously been convicted, and adding a conspiracy count which listed the 32 additional alleged forgeries as overt acts in the conspiracy. The alleged co-conspirator, one Arnulfo Contreras, was not indicted. The conspiracy count, brought under 18 U.S.C. §371, threatened Petitioner with an additional five years of imprisonment and a $10,000 fine, over and above the potential punishment to which Petitioner would be subject by virtue of the four substantive counts carried over from the first indictment.

Petitioner moved to dismiss the conspiracy count on the grounds of prosecutorial vindictiveness in violation

of due process. After a hearing at which the Assistant U.S. Attorney testified, the district court granted the motion. The court expressly found that "the government knew of the involvement of Arnulfo Contreras prior to the return of the original indictment," but "decided not to indict Contreras originally, because he was a Mexican citizen; consequently, the government knew he could never be extradited and, if indicted, would simply clutter up court records as a fugitive." The court further found that "[i]n having the superseding indictment returned, the government was not concerned with increasing the amount of punishment to which the defendant would be exposed," but rather "the primary, if not sole, purpose...was to overcome the Fifth

Circuit's objection to the introduction of the 32 extraneous forgeries."

The district court concluded that Petitioner established a "prima facie case of vindictive prosecution" by the addition of the conspiracy charge after he exercised his right to appeal, and that Respondent "failed to carry its burden" to rebut the prima facie case. Since the prosecutor's "self-professed purpose for adding the conspiracy count was to make admissible [the] evidence whose admission was the prime ground for the defendant's appeal," and since "the very right vindicated on appeal is the basis of the prosecutor's decision to add a new count to the superseding indictment," the court concluded that there was an unconstitutional motive in the "prosecutor's intent to discourage

other criminal appeals in the future by 'upping the ante' in the current appeal." (Appx. C)

The Government appealed the dismissal of the conspiracy count under 18 U.S.C. §3731. The Fifth Circuit panel affirmed the dismissal, United States v. Krezdorn, 693 F.2d 1221 (5th Cir. 1982) ("Krezdorn II"), but the decision was vacated and the dismissal reversed upon Respondent's motion for rehearing en banc. United States v. Krezdorn, 718 F.2d 1360 (1983) (en banc) (Krezdorn III"). The en banc majority reasoned as follows:

> If the defendant challenges as vindictive a prosecutorial decision to increase the number or severity of charges following a successful appeal, the court must examine the prosecutor's actions in the context of the entire proceedings. If any objective event or combination of events in those proceedings should indicate to a reasonable minded defendant that the prosecutor's decision to increase the severity of charges was motivated by some purpose other than a vindictive desire to

> deter or punish appeals, no presumption of vindictiveness is created. In trying the issue of vindictiveness, the prosecutor may offer proof...that as a matter of fact his actions were not vindictive. The burden of proof (by a preponderance of the evidence) remains on the defendant who raised the affirmative defense. If, on the other hand, the course of events provides no objective indication that would allay a reasonable apprehension by the defendant that the more serious charge was vindictive, i.e., inspired by a determination to "punish a pesky defendant for exercising his legal rights," a presumption of vindictiveness applies which cannot be overcome unless the government proves by a preponderance of the evidence that events occurring since the time of the original charge decision altered that initial exercise of the prosecutor's discretion.

Id. at 1365. The court then concluded:

> Krezdorn's case falls in the former category. The district court found that the "primary, if not sole, purpose of the government in having a superseding indictment returned was to overcome the Fifth Circuit's objection to the introduction of the 32 extraneous forgeries." This finding establishes that a reasonable minded defendant should have appreciated that the prosecutor's actions were taken to pursue a course indicated by the

> appellate opinion rather than to impose a penalty on Krezdorn for having exercised his right of appeal. Furthermore, the district court accepted the prosecutor's representation that it did not believe the additional charge would result in Krezdorn receiving a sentence greater than the one initially imposed. Under the test we conclude should have been applied, these two findings constitute sufficient proof to establish that there was no prosecutorial vindictiveness. The district judge's legal conclusion to the contrary is in error."

Id.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH BLACKLEDGE V. PERRY

The Court of Appeals for the Fifth Circuit has held in this case that no due process violation was shown by the addition of the conspiracy charge against Petitioner following his successful appeal from the initial conviction of the four forgery counts against him. The Court of Appeals' holding flies in the face of this Court's

decision in Blackledge v. Perry, 417 U.S. 21 (1974), and amounts to a flagrant disregard of this controlling Supreme Court precedent.

A. Blackledge Established A Presumption of Vindictiveness From An Increase In Charges Following An Appeal

The Court of Appeals remarkably held that no presumption of prosecutorial vindictiveness was created by the Assistant U.S. Attorney's decision to tack on a conspiracy charge against Petitioner following his successful appeal from the forgery convictions. The court reasoned that, since the district court had found the prosecutor's purpose in obtaining the superseding indictment was to "overcome the Fifth Circuit's objection [in Krezdorn I,] to the introduction of the 32 extraneous forgeries," no "reasonable minded defendant" could have apprehended that the

additional charge was the product of vindictiveness, and therefore no presumption was created. Krezdorn III, supra, at 1365. To say the least, this evaluation of how a presumption of vindictiveness arises (or rather, does not arise) in the post-trial context stands the Blackledge holding on its head.

In Blackledge v. Perry, supra, this Court, in reliance upon its prior decision in North Carolina v. Pearce, 395 U.S. 711 (1969), established that a presumption of vindictive prosecution arises whenever there is an increase in the number or severity of charges against a criminal defendant following the exercise of a right to appeal which results in the necessity of a new trial. Indeed, Blackledge itself involved only the invocation of a right to a trial de novo, a procedure traditionally

accorded far less sanctity than a right to an unfettered appellate review of a conviction. Cf. Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

In Blackledge, the Court found it necessary to establish a prophylactic rule barring the possibility of increased punishment whenever a "realistic likelihood of vindictiveness" exists. Blackledge, supra, at 27. The Court concluded that such a likelihood was posed by the prosecutor's increase of charges upon retrial after appeal:

> "A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at

> hand to discourage such appeals--by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy--the State can insure that only the most hardy defendants will brave the hazards of a de novo trial. ...
>
> A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration."

Id. at 27-8.

That Blackledge thus established a presumption of vindictiveness from the addition of charges upon retrial following an appeal was confirmed and made explicit in United States v. Goodwin, 457 U.S. 368 (1982). The Court in Goodwin drew a bright line between pre-trial and post-trial increases in charges, expressly acknowledging that Pearce and Blackledge reflected "a recognition by the Court of the

institutional bias inherent in the judicial system against the retrial of issues that have already been decided," and that such "institutional pressure...might also subconsciously motivate a vindictive prosecutorial or judicial response to a defendant's exercise of his right to obtain a retrial of a decided question." Goodwin, supra, at 376-7. The Court thus reaffirmed the rule derived from Blackledge "...that the likelihood of vindictiveness justifie[s] a presumption that would free defendants of apprehension of such a retaliatory motivation on the part of the prosecutor." Id. at 376.

Moreover, Blackledge and Goodwin firmly established that the addition of charges after a defendant's initial trial is constitutionally impermissible even in

the absence of evidence of the prosecutor's subjective bad faith or malice.

> "The rationale of our judgment...[is] not grounded upon the proposition that actual retaliatory motivation must invariably exist. Rather, ...since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the [prosecutor]."

Blackledge, supra, at 28; Goodwin, supra, at 376.

In the instant case, the addition of the conspiracy charge against Petitioner after his appeal quite obviously posed a realistic likelihood of vindictiveness and gave rise to a presumption of vindictive retaliation for the appellate success. In the circumstances presented here, the prosecutor had an especially great interest in "self- vindication" for having "to do

over what [he] thought [he] had already done correctly." Goodwin, supra, at 383.

Indeed, one can hardly envision a more apparently retaliatory "upping the ante" than occurred here. A prosecutor who files additional and more serious charges for the express purpose of circumventing an appellate court's rejection of an erroneous theory of admissibility advanced by the prosecution itself at the first trial would certainly appear to be engaged in a blatant effort to impale the Defendant on his own points of error. As the district court noted, the very right vindicated in Petitioner's appeal became the vehicle for the addition of the conspiracy charge against him. And surely any defendant who becomes aware that a reversal of his conviction based upon the improper admission of evidence may result in his reindictment for

conspiracy as a means of bringing those otherwise inadmissible matters before the jury (and "incidentally" raising the specter of increased incarceration) inevitably will be discouraged from appealing the improper conviction. No defendant "should...have to fear even the possibility that his exercise of his right to appeal will result in the imposition of a penalty for so doing." Marano v. United States, 374 F.2d 583, 585 (1st Cir. 1967).

It is precisely for that reason that this Court created the prophylactic rule in Blackledge. As the Ninth Circuit has observed:

> The prophylactic rule is designed not only to relieve the defendant who has asserted his right from bearing the burden from "upping the ante," but also to prevent chilling the exercise of such rights by other defendants who must make their choices under similar circumstances in the future.

United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir.), cert. denied, 434 U.S. 827 (1977). The Fifth Circuit's holding that no presumption of vindictiveness was created by the post-appeal addition of the charges against this Petitioner stands in total disregard of the Blackledge holding and the due process protection which the Blackledge presumption was created to preserve.

B. The Prosecutor's Justification For The Increased Charges Was Insufficient To Overcome The Presumption.

The Court of Appeals put the cart before the horse when it held that the prosecutor's asserted reasons for adding the conspiracy count against Petitioner precluded the creation of a presumption of vindictiveness. Krezdorn III, supra, at 1365. Whatever justification a prosecutor may offer for the post-trial increase in

charges has nothing to do with whether a presumption arises, but rather with whether or not it may be overcome. See United States v. Goodwin, supra.

Even had the Court of Appeals placed the prosecutor's avowed justifications in their proper procedural posture in this case, however, they were plainly insufficient as a matter of law to dispel the reasonable apprehension of vindictiveness which the increased charges created. When a presumption of vindictiveness arises, the prosecutor has the burden to demonstrate that the new charges are based on facts not available at the time of the original charging decision, or that for some reason the increased charges could not have been brought previously. This was firmly established by the holdings in North Carolina v. Pearce, supra, at 726 ("Those

reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original...proceeding"), Blackledge v. Perry, supra, at 29, n. 7 ("This would clearly be a different case if the state had shown that it was impossible to proceed on the more serious charge at the outset..."), and United States v. Goodwin, supra, at 376, n. 8. Compare United States v. Goodwin, 637 F.2d 250, 255 (4th Cir. 1981) (prima facie case of vindictiveness is rebuttable only by "objective evidence to show that the increased charges could not have been brought before the defendant exercised his rights").

Thus, in order to overcome the presumption of vindictiveness in this case, the Government had to show that it could

not have brought the conspiracy charge against Krezdorn at the time of the original indictment. The district court's findings plainly negate any such showing. In fact, by the prosecutor's own testimony in this case, his election not to pursue a conspiracy case against Krezdorn and Arnulfo Contreras at the time of the original indictment was for the Government's own administrative convenience, because Contreras could not be extradited from Mexico and his fugitive status would therefore "clutter up" the court records.

The prosecutor presented no newly-discovered facts or evidence which might justify the increased charges. Indeed, the only explanation offered was that the prosecution's theory of admissibility with regard to the extrinsic offenses at the first trial proved wrong on appeal. This

subjective error, which plainly involved no intervening conduct by Petitioner, simply cannot be deemed a sufficient basis to subject Petitioner to the possibility of even greater punishment than he would otherwise have faced had he not appealed the erroneous conviction.

The prosecutor's purported justification for adding the conspiracy charge was manifestly inadequate to overcome the presumption of vindictive prosecution, and the Court of Appeals simply ignored the clear rationale of Pearce, Blackledge, and Goodwin when it reversed the dismissal of the conspiracy count.

II. THE IMPORTANCE OF THE ISSUES PRESENTED AND THE CONFLICT IN THE CIRCUITS

This case presents a clear and compelling occasion for this Court to address the major questions concerning the doctrine of "prosecutorial vindictiveness" which

were left unresolved by the decision in United States v. Goodwin, 457 U.S. 368 (1982).

In the wake of Goodwin, the various circuits which have faced allegations of vindictive prosecution have had little difficulty in disposing of claims based on an increase in the number or severity of charges following the exercise by a defendant of a procedural right in the pre-trial context. See, e.g., United States v. Hinton, 703 F.2d 672 (2d Cir.), cert. denied, ____ U.S. ____, 103 S.Ct. 3091 (1983) (no presumption of vindictiveness from increase in charges following defendant's disclosure of defect in initial indictment); United States v. Mauricio, 685 F.2d 143 (5th Cir.), cert. denied, ____ U.S. ____, 103 S.Ct. 498 (1982) (no presumption arising from

increase from misdemeanor to felony charge following not guilty plea); United States v. Banks, 682 F.2d 841 (9th Cir. 1982) (no presumption from adding charge after dismissal of initial indictment); United States v. Gallegos-Curiel, 681 F.2d 1164 (9th Cir. 1982) (no presumption from increase of misdemeanor to felony charge following not guilty plea).

The Goodwin decision, however, has produced no clear rule nor similar uniformity of treatment with respect to claims of vindictiveness based on an increase of charges following a defendant's successful appeal from an original conviction. Nor, perhaps, should it have done so, since Goodwin dealt explicitly only with the pre-trial situation. As a result, however, there remains a great variance among the circuits as to the

standards being applied to determine under what circumstances a presumption of vindictiveness arises -- and as to the evaluation of what sorts of justifications by the prosecution are deemed sufficient to overcome such presumption -- in the post-trial context. See, e.g., United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974) (Pearce and Blackledge prophylactic rule applied to establish due process violation and prohibit increase from second-degree to first-degree murder charge following initial mistrial); Lovett v. Butterworth, 610 F.2d 1002 (1st Cir. 1979), cert. denied, 447 U.S. 935 (1980) (per se due process violation under Blackledge established by reindictment on more serious charge upon de novo appeal); United States v. Johnson, 537 F.2d 1170 (4th Cir. 1976) (due process violation under Blackledge

established by addition of numerous charges following successful Rule 11 appeal from initial conviction; presumption of vindictiveness not overcome by prosecutor's claim of unawareness of subsequently-charged crimes at time of original indictment because prosecutor was aware of all facts essential to new indictment prior to defendant's original guilty plea); United States v. Krezdorn, 718 F.2d 1360 (5th Cir. 1983) (en banc) (Blackledge presumption arises only if totality of circumstances demonstrates that "reasonable minded defendant" would perceive vindictive motivation from addition of charges following successful appeal; if so, then presumption may be overcome by proof that events subsequent to original indictment "altered" prosecutor's exercise of discretion); United States v. Motley, 655 F.2d 186 (9th

Cir. 1981) (Blackledge prophylactic rule applied where increased charges were filed following mistrial; prosecutor's attempt to reformulate charges and simplify issues for retrial pursuant to judge's suggestion was deemed insufficient justification for increased charges); United States v. Gallegos-Curiel, 681 F.2d 1164 (9th Cir. 1982) (in dictum: presumption of vindictiveness arises from increase in charges following successful appeal; burden on prosecutor to overcome presumption by showing that increase is justified by objective "independent reasons or intervening circumstances," id. at 1167-9); cf. Ronk v. State, 578 S.W.2d 120 (Tex.Crim.App. 1979) (Blackledge prophylactic rule applied to bar increased charge for same conduct following successful appeal).

This Court should act now to resolve these sharp conflicts among the circuits with respect to the determination of post-trial prosecutorial vindictiveness claims. The lower courts need this Court's guidance to formulate a uniform standard for assessing alleged due process violations arising from the increase of criminal charges following a successful appeal from an erroneous conviction. The Court should reaffirm the prophylactic rule established in Blackledge to protect defendants from prosecutorial infringement on their right to appeal.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Honorable Court grant this petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES Of America,
Plaintiff-Appellant,

v.

Herman V. KREZDORN,
Defendant-Appellee.

No. 81-1404.

United States Court of Appeals,
Fifth Circuit.

November 10, 1983.

Appeal from the United States District Court for the Western District of Texas.

Before CLARK, Chief Judge, BROWN, GOLDBERG, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, GARWOOD, JOLLY and HIGGINBOTHAM, Circuit Judges. (Judge Jerre S. Williams recused himself and did not participate in this decision.)

CLARK, Chief Judge:

A prima facie case of prosecutorial vindictiveness arising from proof of the addition of a charge on remand following a successful appeal that suggested the added charge as a method of curing the error found may be rebutted by a factual showing of no vindictiveness. Despite findings of fact indicating that the prosecutor did not act vindictively, the district court dismissed the added charge. We reverse that dismissal and remand for further proceedings.

I.

In the original indictment in this cause, Herman V. Krezdorn was charged in five separate substantive counts with forging another inspector's signature on Mexican border-crossing card applications for five members of the Ruiz family. The district court directed an acquittal on

one count and the jury convicted Krezdorn on the remaining four counts. This court reversed Krezdorn's convictions. United States v. Krezdorn, 639 F.2d 1327 (5th Cir. 1981). We held that the district court erred in admitting evidence of thirty-two additional forged border-crossing card applications allegedly prepared by Krezdorn but not charged in the indictment. Proof of the uncharged forgeries was ruled inadmissible under Fed.R.Evid. 404(b). A plan was not an element of the offense charged. Therefore, the forgeries were not included in the "plan or scheme" exception to the general rule that evidence of a defendant's "other crimes" is inadmissible. 639 F.2d at 1331. However, dicta in our opinion observed that "[t]he existence of a plan would be directly at issue in, for

instance, a conspiracy charge." Id. at 1331 n.7.

Upon remand, Krezdorn was reindicted on the four counts upon which he had previously been convicted. Krezdorn was also indicted for conspiracy to forge immigration documents in violation of 18 U.S.C. §371. The superseding indictment charged that Krezdorn conspired with Arnulfo Contreras to forge signatures on the five cards sold to the Ruiz family. The forgeries in the substantive counts were charged to be the overt acts in furtherance of the conspiracy. The new conspiracy charge increased by five years of imprisonment and $10,000 in fines the potential penalties that could be assessed under the four original counts.

Following an evidentiary hearing, the district court granted Krezdorn's motion

and dismissed the conspiracy count. The court made the following findings of fact:

Because two prosecutors were involved in the case at various times, it is unclear exactly what evidence was in the possession of the government at the time that the original indictment was returned. Nevertheless, it is clear that the government knew of the involvement of Arnulfo Contreras prior to the return of the original indictment. The government decided not to indict Contreras originally, because he was a Mexican citizen; consequently, the government knew he could never be extradited and, if indicted, would simply clutter up court records as a fugitive.

In having the superseding indictment returned, the government was not concerned with increasing the amount of punishment

to which the defendant would be exposed. It is the prosecutor's impression that, even if the defendant is convicted of the conspiracy offense, he will not receive any punishment in excess of what he received after the first trial.*

The primary, if not sole, purpose of the government in having a superseding indictment returned was to overcome the Fifth Circuit's objection to the introduction of the 32 extraneous forgeries. The government's purpose was to make evidence of these extraneous forgeries admissible as overt acts in a conspiracy between the defendant and Contreras.

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*The prosecutor did not gain this impression by any communication from the court.

The court concluded that Krezdorn established a prima facie case of prosecutorial vindictiveness that the government failed to rebut. A panel of this court affirmed the district court's decision. United States v. Krezdorn, 693 F.2d 1221 (5th Cir. 1982).

The panel held that a presumption of prosecutorial vindictiveness arising from the substitution of "charges which increase the punishment to which a defendant is exposed for the same basic conduct" may be rebutted "only by showing that the decision to charge conspiracy was based upon new facts or evidence not known to the Government at the time of the original indictment." 693 F.2d at 1229-30. This holding was vacated by our action granting rehearing en banc. 5th Cir.Loc.R. 41.3.

The panel erroneously assumed that the original indictment charged Krezdorn with conspiring to forge the Ruiz border crossing applications. 693 F.2d at 1230. On this assumption, it held that the prosecutor had merely substituted a more serious charge for "the same basic criminal behavior." It held that the presumption of prosecutorial vindictiveness could only be overcome by proof of circumstances that did not exist at the time of the original indictment.

II.

Prior precedents in the area of judicial and prosecutorial vindictiveness have detailed the prior opinions of the Supreme Court of the United States and this court. To focus the reader's recall here, it is not necessary to review those holdings in depth.

North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), held that an increased sentence imposed by a judge on retrial following appeal gives rise to a presumption of vindictiveness, which may unconstitutionally deter a defendant's due process right to appeal. To free the defendant of any apprehension that such a retaliatory motivation exists, the presumption can only be rebutted by requiring the judge to affirmatively state in the record reasons for his increased sentence based on information concerning objective, identifiable conduct occurring after the original sentence. Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972), held that a judge's imposition of an increased fine after appeal and retrial does not give rise to a presumption of vindictiveness when it

occurs in the setting of a two-tier trial de novo system applicable to less severe crimes. In Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973), a jury imposed an increased sentence on retrial. The Court held this action raised no presumption of vindictiveness. The Court reasoned that the second jury had no knowledge of the first sentence and no stake in acting to deter appeals.

In Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), the prosecutor changed a misdemeanor charge to a felony charge after a convicted defendant obtained a trial de novo. The Court held the prosecutor's action raised a presumption of vindictiveness that could only be rebutted by proof that the felony charge could not have been brought at the

outset. Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), held that a prosecutor's action in obtaining added charges when a defendant refused to plead gave rise to no presumption of vindictiveness. The Court observed that the action had occurred before trial and during plea bargain talks. In United States v. Goodwin, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982), the Court held that no presumption of vindictiveness was created when a United States attorney, acting before trial, obtained a felony indictment following the defendant's refusal to plead guilty to misdemeanor charges. The Court observed that there was the same "opportunity for vindictiveness" as had been present in Colten and Chaffin, which held such opportunity insufficient to justify

the imposition of a prophylactic rule. Relying on the following quotation from Blackledge, the Court required the defendant to prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for pursuing his appellate rights:

> [T]he Due Process Clause is not offended by all possibilities of increased punishment...but only by those that impose a realistic likelihood of "vindictiveness."

417 U.S. at 27, 94 S.Ct. at 2102, 40 L.Ed.2d 628.

The Fifth Circuit's most extensive consideration of prosecutorial vindictiveness occurred in two prior cases. Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977), cert. denied, 434 U.S. 1049, 98 S.Ct. 897, 54 L.Ed.2d 801 (1978), was the

first. After Hardwick's initial convictions on one robbery count and one assault count were set aside, the prosecutor obtained two robbery and two assault charges growing out of the same "spree of activities." The court distinguished Blackledge as involving the substitution of a more serious charge rather than the bringing of a new charge, and held that vindictiveness in fact was required to overcome the prosecutor's discretion. Hardwick also relied on the breadth of the prosecutor's charge decision discretion established in United States v. Cox, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965).

Rather than use the procedural terminology of presumption and rebuttal, Hardwick spoke of a prima facie case made

by showing the increase in charges, which the prosecutor could rebut by establishing that his reasons were other than to "punish a pesky defendant for exercising his legal rights." 558 F.2d at 301. The court expressly stated that the prosecutor could negate vindictiveness by proof of mistake or oversight in his initial action, a different approach to prosecutorial duty by a successor prosecutor, or public demand for prosecution on additional crimes allegedly committed, a list the court noted was illustrative rather than exhaustive.

Jackson v. Walker, 585 F.2d 139 (5th Cir. 1978), was a case in which a mix of three charges for "the same basic conduct" was changed after appellate reversal. Jackson added to Hardwick's prima facie/rebuttal procedure a balancing test that

required weighing a defendant's due process right to an unfettered appeal against the prosecutor's broad discretion to make charging decisions. This balancing was to be used to determine whether rebuttal proof must show changed circumstances since the original decision, or whether rebuttal could be made by a showing of no vindictiveness in fact. The balancing in Jackson allowed rebuttal by showing no actual vindictiveness because (1) the prosecutor had chosen to prosecute only one of the new mix of charges, a charge less severe than the single charge originally selected for prosecution, and (2) the prosecutor asked the court to impose less than the maximum sentence after conviction.

III.

The judicial history of decisions involving judicial and prosecutorial vindictiveness is now clear enough to teach that it is a mistake to measure cases in this area of the law against fixed gauges. The proper solution is not to be found by classifying prosecutorial decisions as changing or adding charges, as amending decisions already made, as covering the same basic conduct or spree of activity, or as being made pre- or post-trial. Nor is it determinative whether the procedural matrix is appeal and error or trial de novo. It is also unnecessary to seek to strike the delicate balance between the rights of defendant and prosecutor. The surer solution lies in applying a more familiar, less exact test.

If the defendant challenges as vindictive a prosecutorial decision to increase the number or severity of charges following a successful appeal, the court must examine the prosecutor's actions in the context of the entire proceedings. If any objective event or combination of events in those proceedings should indicate to a reasonable minded defendant that the prosecutor's decision to increase the severity of charges was motivated by some purpose other than a vindictive desire to deter or punish appeals, no presumption of vindictiveness is created. In trying the issue of vindictiveness, the prosecutor may offer proof of the sort suggested in Hardwick that as a matter of fact his actions were not vindictive. The burden of proof (by a preponderance of the evidence) remains on the defendant who

raised the affirmative defense. If, on the other hand, the course of events provides no objective indication that would allay a reasonable apprehension by the defendant that the more serious charge was vindictive, i.e., inspired by a determination to "punish a pesky defendant for exercising his legal rights," a presumption of vindictiveness applies which cannot be overcome unless the government proves by a preponderance of the evidence that events occurring since the time of the original charge decision altered that initial exercise of the prosecutor's discretion.

IV.

Krezdorn's case falls in the former category. The district court found that the "primary, if not sole, purpose of the government in having a superseding

indictment returned was to overcome the Fifth Circuit's objection to the introduction of the 32 extraneous forgeries." This finding establishes that a reasonable minded defendant should have appreciated that the prosecutor's actions were taken to pursue a course indicated by the appellate opinion rather than to impose a penalty on Krezdorn for having exercised his right of appeal. Furthermore, the district court accepted the prosecutor's representation that it did not believe the additional charge would result in Krezdorn receiving a sentence greater than the one initially imposed. Under the test we conclude should have been applied, these two findings constitute sufficient proof to establish that there was no prosecutorial vindictiveness. The district judge's

legal conclusion to the contrary is in error.

The district court also concluded that the government's purpose in seeking the superseding indictment was "getting around" an evidentiary obstacle created by the appeal. As the panel expressed it, "[T]he prosecutor is attempting to turn a successful appeal into a pyrrhic victory." 693 F.2d at 1231. This is wrong. In Krezdorn's original appeal we were presented with a claim of evidentiary error. In response to that claim, we ruled that Krezdorn's four convictions must be reversed. Although we observed that the proof admitted in error might have been proper if Krezdorn were charged with conspiracy, we did not rule whether the prosecutor could exercise his discretion to add such a charge. Krezdorn's

appellate victory vindicated his right not to be convicted of the substantive counts based on improper evidence. He now stands an innocent man. However, his assertedly felonious conduct is still subject to another trial--a process that certainly contemplates the proper exercise of prosecutorial discretion. It confuses the evidentiary principle vindicated by the appeal and the independence of the prosecutorial function--a matter not before the prior panel--to reason that the subsequent addition of the suggested conspiracy charge deprived him of his prior appellate success.

The decision of the district court is reversed and the cause is remanded with directions to proceed with Krezdorn's retrial on the remaining substantive counts and the added conspiracy charge.

REVERSED AND REMANDED.

GOLDBERG, Circuit Judge, with whom POLITZ, Circuit Judge, joins, dissenting:

The concept of prosecutorial vindictiveness potentially encompasses all prosecutorial action at every stage of a criminal proceeding. Because the balance of interests between the defendant and the State is shifting throughout the proceeding, it is hardly surprising that no satisfactory standard for assessing allegations of vindictiveness has been devised. Instead of attempting to develop a single standard to control vindictiveness, courts should, following Goodwin, recognize the critical differences between pretrial and posttrial prosecutorial vindictiveness. If courts take account of this distinction, and adopt a prophylactic

rule to protect the defendants' overriding interests during the posttrial period, they will spare defendants the"grisly choice" imposed by the risk of posttrial vindictiveness. Note, Prosecutorial Vindictiveness in the Criminal Appellate Process: Due Process Protection After United States v. Goodwin, 81 Mich.L.Rev. 192, 200 (1982) (footnote omitted) [hereinafter cited as Michigan Note]. Because the majority of the Fifth Circuit today decides to ignore the critical importance of the defendants' interests in the posttrial period and put defendants to the "grisly choice"[1] I must respectfully dissent.

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[1]Michigan Note, supra, at 200 n. 194.

I present an argument now slightly different from that of the panel opinion. First, the Court sitting en banc need not attempt to harmonize old Fifth Circuit precedent. Second, subsequent to the panel opinion I became aware of the Michigan Note cited above, and I am completely persuaded by the thoughtful analysis it offers.

The problem of potential prosecutorial vindictiveness has troubled the court for years. It places in conflict two principles central to our criminal justice system. On one hand, criminal defendants should be free to exercise their legal rights; on the other hand, the prosecutor's function requires considerable discretion in indicting, plea bargaining, prosecuting, and so on. The conflict between these two competing goals

has led courts to articulate ad hoc, case-by-case rules and has generated unfortunate misnomers that have clouded reasoned discussion of the actual issues. Recently, however, the Supreme Court in United States v. Goodwin, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982), articulated a uniform treatment that eliminates the need for ad hoc decision-making. In order to understand Goodwin adequately, I must first place it in context by discussing the Supreme Court cases preceding it. Then I shall discuss the impact of Goodwin on these earlier decisions. Finally, I shall explain the result I believe Goodwin dictates in this case.

I. EVOLUTION OF A DOCTRINE

The basic problem addressed under the rubric of prosecutorial vindictiveness can be simply stated: What should a court do when a prosecutor takes a step harmful to a criminal defendant after that defendant exercises a legal right? The answer to this question varies depending on whether the reviewing court focuses on prosecutorial discretion and the desire to convict criminals, or on due process and the desire to protect individual rights. In North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) and Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974) the Supreme Court focused on due process values. In Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), the Court focused on prosecutorial discretion. These three cases resulted in a tension

not resolved until Goodwin. I will discuss these three cases briefly.

A. Pearce, Blackledge, and Due Process

An emphasis on the freedom of criminal defendants to exercise legal rights led the Supreme Court twice to prohibit actions harmful to criminal defendants after such an exercise. In North Carolina v. Pearce, supra, a criminal defendant successfully appealed his conviction. Upon retrial he was given a more severe sentence than he had received at his first trial. The Supreme Court held that such an increase in punishment would be allowed only when the reason for the increase appears in the record, and that the reason "must be based upon objective information concerning identifiable conduct on the part of the

defendant occurring after the time of the original sentencing proceeding." 395 U.S. at 726, 89 S.Ct. at 2081.

Blackledge, supra, extended the same basic idea to a prosecutor. In Blackledge the defendant was initially tried and convicted of a misdemeanor in state district court and exercised a statutory right to a trial de novo in the state superior court. The prosecutor then indicted the defendant on a felony charge for the same behavior. The Blackledge Court extended Pearce and held that the reindictment violated the due process clause. The Court also noted:

> This would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset, as in Diaz v. United States, 223 U.S. 442,

> 32 S.Ct. 250, 56 L.Ed. 500. In that case the defendant was originally tried and convicted for assault and battery. Subsequent to the original trial, the assault victim died, and the defendant was then tried and convicted for homicide. Obviously, it would not have been possible for the authorities in Diaz to have originally proceeded against the defendant on the more serious charge, since the crime of homicide was not complete until after the victim's death.

Blackledge, 417 U.S. at 29 n. 7, 94 S.Ct. at 2103 n.7.

Blackledge used the phrase "prosecutorial vindictiveness" to describe the problem it sought to remedy. In retrospect, that was an unfortunate choice of

words, because it suggests that the problem was merely one of renegade prosecutors attempting to punish valid assertions of constitutional rights. Indeed, due process clearly prohibits actual vindictive punishment of a defendant's assertion of a constitutional right, but Blackledge saw "prosecutorial vindictiveness" as a much more systemic problem:

> [I]f the prosecutor has the means readily at hand to discourage such appeals--by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy--the State can insure that only the most hardy defendants will brave the hazards of a de novo trial.

There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry. The rationale of our judgment in the Pearce case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." 395 U.S. at 725, 89 S.Ct. at 2080. We think it clear

that the same considerations apply here.

Id. 417 U.S. at 27-28,[2] 94 S.Ct. at 2102.

Thus it is clear that the doctrine of prosecutorial vindictiveness in Blackledge was not intended to provide a remedy for past wrongs. Instead, it was intended to remove any deterrent bar to future defendants contemplating whether to assert a protected right. Blackledge stands squarely in the due process protecting mode.

B. Bordenkircher and Prosecutorial Discretion

The Supreme Court's next word on the subject was in the prosecutorial

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[2]Perhaps to emphasize that it was referring to apprehension of vindictiveness rather than actual vindictiveness, the Court used the word "vindictiveness" in

(Footnote Continued)

discretion mode. Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), held that there was no violation of due process when a prosecutor filed more severe charges after the defendant refused to plead guilty to lesser charges. Bordenkircher did not purport to overrule Blackledge, but rather chose to emphasize some factors Blackledge mentioned only in passing and to deemphasize some of the key points I just discussed from Blackledge.

Thus, in Bordenkircher the Court emphasized the societal interest in plea bargaining and the prosecutor's need for discretion in charging decisions. As a corollary, the Court placed less emphasis on the need to promote due process. In

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(Footnote Continued)
quotes. See, e.g., 417 U.S. at 26, 27, 94 S.Ct. at 2101, 2102.

fact, the Court went so far as to state a slightly revisionist view of the thrust of Blackledge:

> The Court has emphasized that the due process violation in cases such as Pearce and Perry lay not in the possibility that a defendant might be deterred from the exercise of a legal right, see Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584; Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714, but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction. See Blackledge v. Perry, supra, 417 U.S., at 26-28, 94 S.Ct., at 2101-02.

Id. 434 U.S. at 363, 98 S.Ct. at 668. Needless to say, this is perhaps a

less-than-faithful account of what Blackledge actually says on the cited pages. In any event, Bordenkircher quite clearly is a decision in the prosecutorial discretion mode.

C. Confusion in the Circuits

After Bordenkircher, the prosecutorial vindictiveness doctrine was in disarray. Blackledge and Bordenkircher had articulated two distinct guiding principles, always in conflict, with both always present and neither carrying with it any intrinsic limiting precept. Blackledge stood for the right of criminal defendants to be free to exercise legal rights without fear of reprisals through vindictive exercises of prosecutorial discretion. Bordenkircher stood for the pragmatic recognition for the need of prosecutors to have discretion in bringing

additional or different charges. The circuit courts had obvious and understandable difficulty in melding the two conflicting goals of Blackledge and Bordenkircher. See generally, Michigan Note, supra, at 200-08. This situation remained unclear until Goodwin.

II. GOODWIN TO THE RESCUE

A. Reconciling Blackledge and Bordenkircher

In United States v. Goodwin, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982), the Supreme Court finally brought coherence to the field by harmonizing the two competing interests of free exercise of legal rights and the need for prosecutorial discretion. Goodwin accomplished this feat not by holding that one interest was of greater virtue than the other, but by recognizing that each interest has an area of primacy. Goodwin

articulated a pretrial/posttrial distinction and held that in the pretrial context, the need for prosecutorial discretion was foremost.

Goodwin involved a criminal defendant facing misdemeanor charges for assault. Goodwin refused to plead guilty to the misdemeanor and requested a trial by jury. The prosecutor then reindicted Goodwin for a felony charge for the same incident. The Court in Goodwin squarely held that in the pretrial context the prosecutor has the discretion to increase charges after a defendant's exercise of a right except for the purpose of punishing that exercise. The question we must now face is what constraints remain on a prosecutor's discretion to increase charges outside the pretrial context. Though Goodwin does not explicitly address that question, when it

is viewed in the contest of Blackledge and Bordenkircher it provides an implicit but ample answer.

B. The Posttrial Presumption

Goodwin contributed a phrase to the judicial vocabulary at least as unfortunate as Blackledge's "prosecutorial vindictiveness": Goodwin described Pearce and Blackledge as creating a "presumption of vindictiveness." Thus, another way of stating the question implicitly answered by Goodwin is: When does a presumption of vindictiveness arise?

A compelling answer to this question can be found by looking to the rationale Goodwin used to avoid a presumption in the pretrial context. The Court relied on Blackledge for the proposition that a presumption of vindictiveness should arise only in instances "that pose a realistic

likelihood of 'vindictiveness.'" Blackledge, 417 U.S. at 27, 94 S.Ct. at 2102. With that in mind, the Court explained Pearce and Blackledge as follows:

> Both Pearce and Blackledge involved the defendant's exercise of a procedural right that caused a complete retrial after he had been once tried and convicted. The decisions in these cases reflect a recognition by the Court of the institutional bias inherent in the judicial system against the retrial of issues that have already been decided. The doctrines of stare decisis, res judicata, the law of the case, and double jeopardy all are based, at least in part, on that deep-seated bias. While none of these doctrines barred the retrials in Pearce and

> Blackledge, the same institutional pressure that supports them might also subconsciously motivate a vindictive prosecutorial or judicial response to a defendant's exercise of his right to obtain a retrial of a decided question.

Goodwin, 102 S.Ct. at 2490-91. In distinguishing the pretrial context, the Court noted all of the compelling reasons a prosecutor might have for increasing charges pretrial. The court then stated, "Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision." Id. at 2493. It is certainly true that once a prosecutor has finalized his charges enough that he or she is willing to go to trial on them, the needs for

charging discretion tend to be much less, see, Michigan Note, supra, at 212-13, and the likelihood of vindictiveness much greater.

Finally, the Court distinguished the burden to the government from asserting the right at stake in Goodwin--the right to a jury trial instead of a bench trial--from that in Pearce and Blackledge:

> [B]efore either a jury or a judge the State must present its full case against the accused and the defendant is entitled to offer a full defense. As compared to the complete trial de novo at issue in Blackledge, a jury trial--as opposed to a bench trial--does not require duplicative expenditures of prosecutorial resources before a final judgment may be obtained. Moreover, unlike the

> trial judge in Pearce, no party is asked "to do over what it thought it had already done correctly." A prosecutor has no "personal stake" in a bench trial and thus no reason to engage in "self-vindication" upon a defendant's request for a jury trial. Perhaps most importantly, the institutional bias against the retrial of a decided question that supported the decisions in Pearce and Blackledge simply has no counterpart in this case.

102 S.Ct. at 2494 (footnotes omitted). The factors justifying a presumption in Blackledge and Pearce certainly exist in any posttrial assertion of a legal right.

Another answer to the question of when a presumption arises can be found by looking to the holding in Goodwin; no

presumption of vindictiveness arises in the pretrial context. This conclusion is bolstered by looking at Goodwin relative to Pearce, Blackledge, and Bordenkircher. As the Court explained in Goodwin, it granted certiorari to clarify the scope of Pearce and Blackledge. 102 S.Ct. 2487. Pearce and Blackledge were cases involving a presumption of vindictiveness, and as Goodwin repeatedly noted, they were posttrial cases. Bordenkircher declined to apply a presumption and, as Goodwin noted, it was a pretrial case. Thus we have something considerably more powerful than a mere negative inference. Goodwin claimed to be partitioning the procedural universe between Pearce and Blackledge, the posttrial presumption cases, and Bordenkircher, the pretrial prosecutorial discretion case. Because Goodwin drew the

partitioning line at trial, I can only conclude that Goodwin mandates a presumption of vindictiveness in the posttrial context.

In short, though Goodwin does not explicitly so hold, I believe it clearly stands for a dual proposition. Pretrial, no presumption of vindictivensss is justified. Posttrial, any "upping the ante" by the prosecutor after a defendant's exercise of a legal right gives rise to a presumption of vindictiveness. Goodwin harmonized Blackledge and Bordenkircher by drawing a bright line at trial. Pretrial, Bordenkircher reigns supreme; posttrial, Blackledge holds away. This dual sovereignty should obviate the need to apply an unclear, unpredictable, unpalatable case-by-case analysis.

C. Rebutting the Presumption

The final question is what to do with a presumption of vindictiveness once it arises. How can it be rebutted? it is at this point that the two misnomers in this doctrine combine forces to wreak havoc on careful analysis. The "presumption" is no more an evidentiary presumption than the parol evidence rule is an evidence rule. And "vindictiveness" refers not to the actual motive, but rather to the perception of a defendant considering asserting a legal right. The question in determining whether a "presumption" should arise might be stated: "Would a criminal defendant trying to decide whether to assert a legal right look at the facts of the instant case and presume the prosecutor had acted vindictively?" Thus, the question in dispelling a presumption is whether an unrelated party looking at the

facts of the instant case would be persuaded that the prosecutor did not act vindictively. The question most emphatically is not whether the prosecutor was actually vindictive.

This conclusion gains firm support from Goodwin. First, Goodwin endorses the continuing vitality of the deterrence goal of Pearce and Blackledge, which makes the prosecutor's actual motive irrelevant. Second, in discussing rebuttal, Goodwin calls for objective evidence, also making actual motive irrelevant. I will discuss these two points briefly.

1. Deterrence Lives After Goodwin. -- Pearce and Blackledge were seeking to articulate a rule that would prevent prosecutors from deterring exercises of legal rights by criminal defendants by making them fearful of retaliation. In a

deterrence scheme, the prosecutor's actual motive is irrelevant; the operative question is not the state of the prosecutor's mind, but rather, the state of mind of a defendant contemplating the exercise of a legal right. Bordenkircher recast this motivation as one solely of avoiding actual vindictiveness. Goodwin, while acknowledging the importance of actual vindictiveness in the Bordenkircher-ruled pretrial context, see, e.g., 102 S.Ct. at 2492 n. 12; id. at 2494, also acknowledged that the deterrence rationale of Pearce and Blackledge survives in the posttrial context.

The most evident support for this position is the simple fact that Goodwin as a whole supports a Blackledge presumption in the posttrial context. See

supra Part II.B. More specifically, the Court described the purpose of a Blackledge presumption as one "that would free defendants of apprehension of such a retaliatory motivation on the part of the prosecutor." 102 S.Ct. at 2490. Apprehension of a retaliatory motive can certainly exist in the factual absence of such a motive.

2. Rebutting the Nonpresumption. -- The Court's view of the true nature of the "presumption" is made most clear by its discussion of what will, and will not, suffice to rebut the presumption. First, the Court repeatedly emphasized the irrelevancy of actual motive when a presumption of vindictiveness arises.

> Unlike Bordenkircher, however, there is no evidence in this case that could give rise to a claim of actual

> vindictiveness; the prosecutor never suggested that the charge was brought to influence the respondent's conduct. The conviction in this case may be reversed only if a presumption of vindictiveness--applicable in all cases--is warranted.

102 S.Ct. 2493 (emphasis in original, footnote omitted). The Court further stated:

> In this case, however, the Court of Appeals stated: "On this record we readily conclude that the prosecutor did not act with actual vindictiveness in seeking a felony indictment." [U.S. v. Goodwin] 637 F.2d [250] at 252. Respondent does not challenge that finding. Absent a presumption of vindictiveness, no due process violation has been established.

Id. at 2494-95. Thus, even in the face of a factual finding, supported by the record, of no actual vindictiveness, a "presumption of vindictiveness" would still establish a due process violation. No mere evidentiary presumption concerned with the presence or absence of actual vindictiveness would function in that manner.

This conclusion is further reinforced by the indications the Court gave of what would rebut the presumption. The presumption when it arises is based on Pearce and Blackledge. As the Goodwin Court noted, the Pearce "Court applied a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence." Id. at 2489. In discussing Blackledge, the Court noted that "[t]he

presumption again could be overcome by objective evidence justifying the prosecutor's action." Id. at 2490, n. 8. The Goodwin Court also quoted Blackledge's example of Diaz, where "it was impossible to proceed in the more serious charge at the outset." Id. (quoting Blackledge, 417 U.S. at 29 n. 7, 94 S.Ct. at 2103 n. 7). The Goodwin Court summarized Blackledge and Pearce as establishing a presumption that could not be rebutted "unless the prosecutor comes forward with objective evidence to show that the increased charges could not have been brought before the defendant exercised his rights." Id. at 2488.

If the presumption of vindictiveness were intended to be a mere evidentiary presumption of actual vindictiveness, it would relate to that very subjective,

"complex and difficult to prove," id. at 2489, question of motive. In that case, there would be no point in restricting rebuttal evidence to objective evidence--subjective evidence is perfectly acceptable to establish subjective motive. There certainly would be no point in requiring a showing that "the increased charges could not have been brought before the defendant exercised his rights." Id. at 2488 (emphasis added). The only point of such restrictions would be to dispel any apprehension of vindictiveness. Indeed, I believe such a conclusion to be inescapable after Goodwin.

D. Goodwin meets Krezdorn

In short, the rule for the posttrial context can be easily stated after Goodwin. In the posttrial context, a so-called presumption of vindictiveness

arises any time the prosecutor "ups the ante" after a defendant exercises a legal right. Upping the ante certainly includes a possibility of increased sentence, but need not be limited to that. See Blackledge, 417 U.S. at 29 n. 6, 94 S.Ct. at 2103 n. 6. The presumption may be rebutted only by objective evidence showing that the increase charges could not have been brought until after the defendant exercised the legal right.

With this rule in mind, it is a simple matter to dispose of this case. Appellee Krezdorn successfully appealed his first conviction. The prosecutor then upped the ante by reindicting for a more serious crime. Thus a presumption arises. The only explanation for the increased charges was that the panel opinion in Krezdorn's first appeal, in dicta,

reminded the prosecutor of a long-standing rule of evidence. This certainly and definitely does not constitute objective evidence that the charges could not have been brought before Krezdorn's first successful appeal. Due process, therefore, requires that the additional charges be dismissed and the decision of the district court be affirmed.

CONCLUSION

As is clear by now, my analysis of the problem of prosecutorial vindictiveness differs considerably from that of the majority of the Fifth Circuit. The result I would reach in this case plainly differs. The underlying concerns also differ. I place more emphasis on preventing prosecutorially incurred apprehension of vindictiveness so that a

criminal defendant may freely exercise the rights granted him by law. The majority places more emphasis on the prosecutor's need for discretion in charging and limits that discretion solely by prohibiting actual vindictiveness.

Because the majority's rule places upon defendants the "grisly choice," see supra note 1, I believe it is bad policy and would dissent solely upon that ground. More important, however, is my firm belief that the Fifth Circuit is being less than true to the scheme established by Goodwin. I believe Goodwin, though not totally explicit, establishes a pretrial/posttrial distinction. In the posttrial arena, due process and the Supreme Court command us to be most solicitous of the possibility of an apprehension of vindictiveness in order to preserve the integrity of the

protections imbedded in our criminal justice system. The majority appears to me to be unduly solicitous of the expediency required to secure criminal conviction. I believe that Goodwin, the Constitution, and fundamental notions of fairness dictate that expediency not be our first priority. Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellant,

v.

Herman V. KREZDORN,
Defendant-Appellee.

No. 81-1404.

United States Court of Appeals,
Fifth Circuit.

December 23, 1982.

Appeal from the United States District Court for the Western District of Texas.

Before BROWN, GOLDBERG and POLITZ, Circuit Judges.

GOLDBERG, Circuit Judge:

In this appeal, we are called upon to review a finding of prosecutorial vindictiveness.

1. FACTS AND PROCEEDINGS BELOW

In 1979, Herman V. Krezdorn, a United States Immigration Inspector, was indicted on five counts of forging immigration documents in violation of 18 U.S.C. §1426(a).[1] The district court directed a verdict of acquittal on one count, and a jury convicted defendant on the remaining four counts. On appeal, this Court held that the district court erred in allowing the prosecution to introduce evidence of thirty-two additional forgeries not charged in the original indictment. We therefore reversed the conviction U.S. v. Krezdorn, 639 F.2d 1327 (5th Cir. 1981).[2]

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[1]The indictment alleged that Krezdorn forged another inspector's signature on Mexican border-crossing card applications for five members of the Ruiz family.

[2] The evidence was found inadmissible under Fed.R.Evid. 404(b) on

(Footnote Continued)

Following this Court's action in "Krezdorn I," the Government reindicted defendant on the four forgery counts originally charged. The superseding indictment also charged Krezdorn with conspiracy[3] to forge immigration documents, in violation of 18 U.S.C. §371. The conspiracy charge added five years imprisonment and a ten thousand dollar fine to the potential punishment faced by the

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(Footnote Continued)
the grounds that a "plan" was not an element of the offense with which Krezdorn was charged, and therefore, the additional forgeries did not fall within the "plan or scheme" exception to the general rule that evidence of a defendant's "other crimes" is inadmissible. U.S. v. Krezdorn, 639 F.2d at 1331. This Court noted, however, that "[t]he existence of a plan would be directly at issue in, for instance, a conspiracy charge." Id. at n. 7.

[3] Krezdorn was alleged to have conspired with one Arnulfo Contreras to forge signatures on five border-crossing cards sold to members of the Ruiz family.

defendant, over and above the penalties for the four counts originally charged. The thirty-two forgeries found to be inadmissible at Krezdorn's first trial were alleged to be "overt acts" in furtherance of the conspiracy charged in the superseding indictment.

Defendant Krezdorn moved to dismiss the conspiracy charge on the grounds of prosecutorial vindictiveness.[4] The prosecutor denied any vindictive motive for the superseding indictment. An evidentiary hearing was held to resolve the conflicting claims. After hearing the testimony of the

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[4] Defendant does not contend that the superseding indictment puts him twice in jeopardy for the same offense. Cf. Jackson v. Walker, 585 F.2d 139, 141 n. 2 (5th Cir. 1978) (additional charges do not violate the Double Jeopardy Clause if they require proof of facts not required to prove the original charge).

Assistant United States Attorney responsible for the case, the district court found that the prosecution was aware of all the facts giving rise to the conspiracy charge at the time the Government brought its original indictment, and that no new evidence had come to light since the first trial. The district court also found that the Government decided not to bring the conspiracy charge in the original indictment because to do so would have involved some administrative inconvenience.[5] Finally, the district court concluded that the conspiracy charge was

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[5] The district court found that, "[t]he government decided not to indict Contreras originally, because he was a Mexican citizen; consequently, the government knew he could never be extradicted and, if indicted, would simply clutter up the court records as a fugitive."

added for the purpose of transforming the thirty-two additional forgeries from inadmissible extraneous evidence into evidence admissible as overt acts in a conspiracy between Krezdorn and Contreras.[6]

Based on the facts, the district court concluded that defendant Krezdorn had established a prima facie case of "prosecutorial vindictiveness." The lower court also concluded that the Government had failed to explain the increased severity of the superseding indictment in terms sufficient to dispel the reasonable

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[6] The prosecutor testified that he was of the impression that even if Krezdorn was convicted of the conspiracy charge, he would not receive any punishment in addition to that meted out after his first conviction. However, the district court noted that, "[t]he prosecutor did not gain this impression by any communication from this court."

apprehension of retaliatory motive created by the addition of charges following appeal. Accordingly, the conspiracy count was dismissed. The Government then brought this appeal.

2. PROSECUTORIAL VINDICTIVENESS POST-GOODWIN

A prosecutor's decision to reindict a defendant is circumscribed by the Due Process Clause of the Constitution. Blackledge v. Perry, 417 U.S. 21, 26, 94 S.Ct. 2098, 2101, 40 L.Ed.2d 628 (1974). "To punish a person because he has done what the law allows him to do is a due process violation 'of the most basic sort.'" U.S. v. Goodwin, ____ U.S. ____, 102 S.Ct. 2485, 2488, 73 L.Ed.2d 74 (1982), quoting Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 667, 54 L.Ed.2d 604 (1978). Thus, whenever a prosecutor adds

new charges to an indictment, a careful inquiry is necessary to determine that the new charges were not added to retaliate against the defendant for exercising statutory or Constitutional rights.

Following the Supreme Court's most recent addition to the doctrine of prosecutorial vindictiveness, U.S. v. Goodwin, supra, it is now clear that the nature of the court's inquiry into prosecutorial motive will depend upon whether new charges are added before or after a defendant's initial trial. Prior to Goodwin, the leading Supreme Court cases on prosecutorial vindictiveness were North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) and Blackledge v. Perry, supra. Those cases established the proposition that a showing of bad faith or malice on the prosecutor's part was

unnecessary to a finding of "prosecutorial vindictiveness."[7] In finding additional charges unconstitutionally impermissible even absent evidence of bad faith or malice, the Court in Blackledge stated,

> The rationale of our judgment ... [is] not grounded upon the proposition that actual retaliatory motivation must invariably exist. Rather, ... 'since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to

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[7] In Blackledge, the defendant was originally charged with a misdemeanor. After exercising his right to a jury trial de novo in a higher state court, the defendant was charged with a felony. The Court stated that there was "no evidence that the prosecutor acted in bad faith or maliciously in seeking a felony indictment against [the defendant]," Blackledge, supra 417 U.S. at 28, 94 S.Ct. at 2102; but held that the more severe charge was nonetheless barred by the Due Process Clause.

> appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the [prosecutor].'

Blackledge, supra 417 U.S. at 28, 94 S.Ct. at 2102, quoting North Carolina v. Pearce, supra. Taken together, Pearce and Blackledge have been interpreted as creating a "presumption" of prosecutorial vindictiveness. U.S. v. Goodwin, supra 102 S.Ct. at 2490. Under a Blackledge-derived presumption, a defendant need not prove that the prosecutor's decision to add new charges was motivated by "actual vindictiveness," that is, a subjective intent to punish the defendant for exercising his rights. Instead, the

courts[8] have held that whenever a prosecutor brings more serious charges following the defendant's exercise of procedural rights, "vindictiveness" is presumed. This presumption can only be overcome by proof of some objective factor, such as the discovery of new evidence,

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[8] Circuit court decisions interpreting Blackledge include Jackson v. Walker, 585 F.2d 139 (5th Cir. 1978); Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977), cert. denied, 434 U.S. 1049, 98 S.Ct. 897, 54 L.Ed.2d 801 (1978); U.S. v. Goodwin, 637 F.2d 250 (4th Cir. 1981); U.S. v. Johnson, 537 F.2d 1170 (4th Cir. 1976); U.S. v. Andrews, 612 F.2d 235 (6th Cir. 1979); vacated and remanded, 633 F.2d 449 (6th Cir. 1980) (en banc), cert. denied, 450 U.S. 927, 101 S.Ct. 1382, 67 L.Ed.2d 358 (1981); U.S. v. Stacey, 571 F.2d 440 (8th Cir. 1978); U.S. v. Ricard, 563 F.2d 45 (2nd Cir. 1977); U.S. v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976); U.S. v. Jamison, 164 U.S.App.D.C. 300, 505 F.2d 407 (1974).

which can explain or justify the prosecutor's decision.[9]

In Goodwin, the Supreme Court explained that a presumption of vindictiveness is justified when a prosecutor increases charges prior to the retrial of a defendant occasioned by the defendant's successful exercise of a procedural right, such as the right to appeal, for two reasons. First, the increased charges are unlikely, at that point, to be based on new

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[9] In U.S. v. Goodwin, supra, the Court dealt with a presumption of prosecutorial vindictiveness as developed from Blackledge by the Fourth Circuit. Under the Fourth Circuit's test, the government is not allowed to increase charges against a defendant following the defendant's exercise of a procedural right unless the prosecutor comes forward with objective evidence to show that the increased charges could not have been brought before the defendant exercised his rights. U.S. v. Goodwin, 637 F.2d 250 (4th Cir. 1981).

information or a different approach to prosecutorial duty.[10] Secondly, "institutional biases inherent in the judicial system" disfavor the retrial of issues already decided. U.S. v. Goodwin, supra 102 S.Ct. at 2490-91.[11] Thus, when a prosecutor's decision to increase the number or severity of charges follows the defendant's exercise of a procedural right necessitating his retrial, the decision is

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[10] [O]nce a trial begins--and certainly by the time a conviction has been obtained--it is much more likely that the State has discovered and assessed all of the information against an accused and made a determination, on the basis of that information, of the extent to which he should be prosecuted.
U.S. v. Goodwin, supra 102 S.Ct. at 2493.

[11] Judicial doctrines embodying this bias include, "the doctrines of stare decisis, res judicata, the law of the case, and double jeopardy..." Id.

likely to be improperly colored by the prosecutor's bias, even if only "subconscious," against retrial of decided issues. Id.[12] Thus, the likelihood of improper motivation justifies a presumption of prosecutorial vindictiveness in order to free defendants from the apprehension of retaliation for the exercise of statutory or constitutional rights. U.S. v. Goodwin, supra 102 S.Ct. at 2494.

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[12] In addition to institutional biases against retrial, other, more prosaic, factors make it likely that a post-trial decision to increase charges is improperly motivated. Retrial requires duplicative expenditures of (often scarce) prosecutorial resources. The Government is being asked "to do over what it thought it had done correctly." Colten v. Kentucky, 407 U.S. 104, 117, 92 S.Ct. 1953, 1960, 32 L.Ed.2d 584 (1972). When retrial is required because of a prosecutor's error in the original trial, the prosecutor may have a personal stake in vindicating himself. U.S. v. Goodwin, supra 102 S.Ct. at 2494;

(Footnote Continued)

However, the Court found that a prosecutor's decision to increase charges prior to a defendant's initial trial does not present a similar danger of improper motivation. The defendant in Goodwin was originally charged with several misdemeanor offenses. The case was handled by a prosecutor who was assigned to try misdemeanor cases before Magistrates. The defendant decided not to enter into a plea bargain, and requested a trial by jury in District Court. Responsibility for the case was then assumed by an Assistant United States Attorney, who obtained an indictment charging defendant with a felony arising out of the same incident upon which the earlier misdemeanor charge was based.

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Chaffin v. Stynchcombe, 412 U.S. 17, 27, 93 S.Ct. 1977, 1983, 36 L.Ed.2d 714 (1973).

Employing a presumption of prosecutorial vindictiveness, the Court of Appeals held that the Due Process Clause prohibited the Government from bringing more serious charges after the defendant had invoked his right to a jury trial.[13]

The Supreme Court reversed, finding that the addition of charges prior to defendant's trial was not so likely to be tainted with improper motivation as to justify a presumption of prosecutorial vindictiveness. U.S. v. Goodwin, supra 102 S.Ct. at 2493. The Court reasoned that prior to trial, "the prosecutor's

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[13] The Circuit Court also concluded that the prosecutor's explanation for the increased charges failed to rebut the presumption, since the prosecutor did not show that the increased charges could not have been brought prior to defendant's request for a jury trial. U.S. v. Goodwin, 635 F.2d at 252.

assessment of the proper extent of prosecution may not have crystallized." Id. A presumption of vindictiveness might unjustifiably hamper the prosecutor's discretion to increase charges when preparation and review of the case prior to trial indicated that additional prosecution was in society's interest. Id. Institutional biases against retrial of previously decided cases are not likely to affect the prosecutor's reaction to the invocation of procedural rights prior to trial. Id. Since there is little likelihood of vindictiveness in pre-trial charging decisions, the Court concluded, a presumption of prosecutorial vindictiveness is not required to allay defendant's apprehension of retaliation for invoking

rights. U.S. v. Goodwin, supra 102 S.Ct. at 2494.[14]

In the instant case, the Government decided to increase the number of charges against Krezdorn following his successful appeal to this Court. Thus, this case falls squarely within the category of cases as to which the Supreme Court has stated that a presumption of prosecutorial vindictiveness is justified by the high probability that the charging decision was improperly motivated. All of the dangers of improper motivation are clearly present.

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[14] In refusing to employ a presumption of vindictiveness, however, the Court did not foreclose the possibility that defendants could establish "actual vindictiveness" by proof that "the prosecutor's charging decision was motivated by a desire to punish [defendant] for doing something which the law plainly allowed him to do." Id.

Defendant was convicted by a jury on four of the five counts originally charged. He exercised his right to appeal his conviction on the grounds that extrinsic evidence was erroneously admitted. This Court reversed the conviction, rejecting the prosecutor's theory that the evidence was admissible under an exception to the Rules of Evidence. The case was remanded for a retrial. The prosecutor then obtained a superseding indictment containing an additional charge of conspiracy which increased by five years the maximum sentence faced by defendant.[15]

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[15] The fact that the prosecutor thought that Krezdorn's actual sentence would not be increased by the additional conspiracy charge is irrelevant. "[T]he severity of an alleged offense is not determined by the actual punishment imposed but by the potential punishment for the

(Footnote Continued)

Without in any way impugning this prosecutor's motives,[16] there was a clear likelihood that the decision to increase the number of charges could have been affected by "institutional bias" against the necessity of retrying this defendant in order to obtain a conviction. The Government was told by this Court to "do over what it thought it had already done

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(Footnote Continued)
offense, viewed prospectively." Miracle v. Estelle, 592 F.2d 1269, 1275 (5th Cir. 1979).

[16] We reiterate our observation in Jackson v. Walker, 585 F.2d at 142 n. 3, that the term "prosecutorial vindictiveness," with its ad hominem overtones, is misleading. Our task, in spite of the pejorative nomenclature, is to examine the perception and apprehension of the defendant, rather than to focus on the benignity of the prosecutor. It is the appearance of vindictiveness with which we are concerned. See North Carolina v. Pearce, supra; Blackledge v. Perry, supra.

correctly."[17] In particular, this prosecutor's evidentiary theory was found to be erroneous, giving rise to a temptation to engage in "self-vindication."[18] The circumstances in which the conspiracy charge was added were clearly such as to cause a reasonable apprehension of vindictiveness, and thus to discourage defendants from seeking appellate review. See, e.g., Miracle v. Estelle, 592 F.2d 1269 (5th Cir. 1979); Jackson v. Walker, 585 F.2d 139 (5th Cir. 1978); Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977). Thus, drawing upon both the decisions of this Circuit concerning prosecutorial vindictiveness, and the

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[17] See U.S. v. Goodwin, 102 S.Ct. at 2494.

[18] See id.

Supreme Court's recent pronouncements in U.S. v. Goodwin, we conclude that the district court was correct in employing a presumption of vindictiveness to analyze this prosecutor's decision to add a conspiracy charge against defendant Krezdorn following his successful appeal.

3. THE PURE-HEARTED PROSECUTOR VS. THE APPREHENSIVE DEFENDANT

Having concluded that a presumption of vindictiveness was appropriate, we must now decide whether the prosecutor's explanation of his decision to add charges suffices to dispel the apprehension of vindictiveness created by his actions. Our inquiry is complicated by the fact the law in this area is far from uniform.[19] The Supreme

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[19] The law of prosecutorial vindictiveness in the various circuits has (Footnote Continued)

Court's decision in Blackledge v. Perry precipitated a veritable blizzard of cases discussing the doctrine of prosecutorial vindictiveness.[20] Just as no two snowflakes are alike, each claim of prosecutorial vindictiveness gives rise to a different analysis based on the unique facts of the individual case. However, certain discernible trends have emerged. The Fourth Circuit, for example, takes a strict approach, holding that a prosecutor can rebut a presumption of prosecutorial vindictiveness only by evidence showing that the increased charges could not have

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been termed "chaotic." U.S. v. Andrews, 612 F.2d 235, 257 (6th Cir. 1979) (Keith, J., dissenting), vacated and remanded, 633 F.2d 449 (6th Cir. 1980) (en banc), cert. denied, 450 U.S. 927, 101 S.Ct. 1382, 67 L.Ed.2d 358 (1981).

[20] See note 8, supra.

been brought prior to the defendant's exercise of his rights. See U.S. v. Goodwin, 637 F.2d 250 (4th Cir. 1981). The Ninth Circuit follows the rule that when a prosecutor adds on charges after the defendant invokes a procedural right, the prosecutor bears a heavy burden to rebut a presumption of prosecutorial vindictiveness. See, e.g., U.S. v. Motley, 655 F.2d 186 (9th Cir. 1981); U.S. v. DeMarco, 550 F.2d 1224 (9th Cir.), cert. denied, 434 U.S. 827, 98 S.Ct. 105, 54 L.Ed.2d 85 (1977); U.S. v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976).[21] The Sixth Circuit

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[21] The Ninth Circuit has stated clearly that mere mistake or inexperience on the part of the prosecutor does not suffice to rebut a presumption of prosecutorial vindictiveness. U.S. v. Ruesga-Martinez, supra at 1370. Nor can the Government meet its rebuttal burden by

(Footnote Continued)

asks whether the prosecutor's increase in charges creates a realistic likelihood of vindictiveness; if so, the prosecutor bears the burden of rebutting the presumption of vindictiveness with "objective" explanations. See U.S. v. Andrews, 633 F.2d 449 (6th Cir. 1980) (en banc), cert. denied, 450 U.S. 927, 101 S.Ct. 1382, 67 L.Ed.2d 358 (1981).[22]

In U.S. v. Goodwin, the Supreme Court addressed itself to the issue of when,

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explaining that charges were reformulated for reasons of trial strategy, when the effect of the reformulation is to increase the potential punishment faced by defendant on retrial. U.S. v. Motley, supra at 189-190.

[22] In Andrews, the prosecutor's statement that charges were increased to rectify an earlier mistake in formulating the indictment was rejected as insufficiently "objective" to rebut the presumption. Id. at 456.

during criminal proceedings, a presumption of prosecutorial vindictiveness would attach. See discussion at pages 1224-1226, supra. The Court did not decide what type of evidence would suffice to rebut a presumption of vindictiveness once that presumption was justified.[23] Thus, while Goodwin clarifies certain aspects of the doctrine of prosecutorial vindictiveness, it is not decisive of the issue now before us.

Our analysis begins with an earlier Fifth Circuit decision, Jackson v. Walker, 585 F.2d 139 (5th Cir. 1978). In Jackson,

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[23] Justice Blackmun, in his concurring opinion, took the position that the approach used by the Fourth Circuit was overly strict. In his view the explanation given by the prosecutor in Goodwin was sufficiently "objective" to dispel the appearance of vindictiveness. U.S. v. Goodwin, 102 S.Ct. at 2495-96.

this Court recognized that a claim of prosecutorial vindictiveness brings into conflict the defendant's due process right to be free from the apprehension of increased punishment resulting from an exercise of his rights, on the one hand; and the prosecutor's discretion to increase the extent of prosecution, on the other hand. Id. at 143. Based on our analysis of the Supreme Court's decision in Blackledge, supra, and this Court's decision in Hardwick v. Doolittle, supra, we concluded that the balance between these competing interest turned on whether the prosecutor added a new charge for relatively distinct criminal conduct occurring within the same "spree" of activity, as in Hardwick, supra; or whether the prosecutor simply substituted a more serious charge for the same criminal activity, as in Blackledge, supra.

Preventing a prosecutor from adding new charges for different and discrete criminal behavior is a relatively serious infringement on the traditionally broad discretion accorded to prosecutors. In contrast, a prosecutor's decision to substitute more serious charges for the same basic conduct involves only "the prosecutor's right to reopen a previously completed exercise of discretion." Id. at 144. Accordingly, the defendant's right to be free from the apprehension of vindictiveness is accorded more weight when more serious charges are substituted for the same behavior than when the prosecutor decides to add new charges for different criminal behavior.

We agree with the Sixth Circuit that the distinction between substituting more serious charges and adding new charges is relevant in determining what type of

explanation on the prosecutor's part will be regarded as sufficient to rebut a presumption of prosecutorial vindictiveness. See U.S. v. Andrews, 612 F.2d at 244.[24] In Jackson, we held that a determination of "actual vindictiveness" was required in order to justify infringing on the prosecutor's discretion to add new charges for relatively distinct criminal behavior. Jackson at 145. We noted, however, that the defendant was not required to present evidence of retaliatory

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[24] On rehearing en banc, a majority of the Sixth Circuit agreed with the panel's determination that the distinction between substituting and adding charges was relevant to a finding of prosecutorial vindictiveness, but found that a per se rule was inappropriate. U.S. v. Andrews, 633 F.2d at 454. The Court concluded that the proper inquiry was whether, on the facts of each case, "a reasonable person would think there existed a realistic likelihood of vindictiveness." Id.

motivation on the prosecutor's part. Instead, the addition of charges following the exercise of some procedural right was held to create a presumption of vindictiveness which could be rebutted with "reasonable explanations" for the added charges. Id. at 145 n. 9, citing Hardwick v. Doolittle, supra.[25] Under this standard, the focus is on the prosecutor's motivation. U.S. v. Andrews, 612 F.2d at 244. It follows that the district court may consider any reasonable explanation for the added charges, so long as the explanation

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[25] Compare U.S. v. Goodwin, supra 102 S.Ct. at 2494 (when charges are added prior to defendant's initial trial, prosecutorial vindictiveness is so unlikely that a presumption is not justified; thus, defendant can establish prosecutorial vindictiveness only by a showing of actual retaliatory motivation). See note 9, supra.

tends to negate an inference of retaliatory motivation. In addition to explanation relating to the discovery of new evidence,[26] the district court may consider "mistake or oversight in the initial action, a different approach to prosecutorial duty ..., or public demand for prosecution on the additional crimes allegedly committed." Hardwick, supra at 301.[27]

However, when a prosecutor substitutes charges which increase the punishment to which a defendant is exposed for the same basic conduct, our focus switches from the

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[26] See, e.g., U.S. v. Phillips, 664 F.2d 971, 1021 (5th Cir. 1981).

[27] Of course, the credibility of any explanation offered by the prosecutor must be carefully scrutinized on the basis of all the facts and circumstances surrounding the addition of charges.

prosecutor's motivation to the defendant's perception. In this case, no actual retaliatory motive need exist. Blackledge v. Perry, 417 U.S. at 28, 94 S.Ct. at 2102. Rather, "due process ... requires that a defendant be freed of the apprehension of ... a retaliatory motivation on the part of the [prosecutor]." Id. Our focus is on the defendant's perception, not the prosecutor's motivation. U.S. v. Andrews, 612 F.2d at 244. It follows that when a prima facie case of prosecutorial vindictiveness is created by the substitution of more serious charges, rebuttal explanations focusing on the prosecutor's lack of subjective retaliatory motivation are irrelevant. Since our focus is on the defendant's perception, rather than the prosecutor's "pure heart," a prima facie case of prosecutorial vindictiveness

can be overcome only by a showing that "intervening circumstances, of which the prosecutor could not reasonably have been aware, created a fact situation which did not exist at the time of the original indictment." U.S. v. Andrews, supra. Cf., U.S. v. Goodwin, 637 F.2d 250, 255 (4th Cir. 1981) (a prima facie case of prosecutorial vindictiveness can be rebutted only by "objective evidence to show that the increased charges could not have been brought before the defendant exercised his rights"); see generally Note, Evaluating Prosecutorial Vindictiveness Claims in Non-Plea-Bargained Cases, 55 S.Cal.L.Rev. 1133, 1150-52 (1982) (judicial analysis of prosecutorial vindictiveness claims should focus on whether factors justifying added charges were known to the prosecutor prior to the original charging decision).

Applying the foregoing principles, we must determine whether the Government's decision to include a conspiracy count in the superseding indictment was closer to the substitution of more severe charges for the same basic conduct, or to the addition of new charges for discrete behavior within the same "spree" of criminal activity. The relationship of a conspiracy charge to the underlying crime is to some extent unique within the terms of this classification scheme. See U.S. v. Andrews, 612 F.2d at 245. Under the test applicable to claims of double jeopardy, see note 4 supra, it is clear that a conviction for conspiracy to commit forgery requires proof of some additional facts not needed to prove the

underlying substantive charge.[28] However, in the context of prosecutorial vindictiveness, the double jeopardy test is not controlling. Rather, we must inquire whether there is such substantial overlap between the evidence presented to prove the original charges and that which is required to prove the added charge, as to create, for all practical purposes, the impression that a more severe charge has been substituted for the same basic conduct.

Conspiracy clearly involves some element of distinct and different criminal behavior; specifically, the crime of agreeing with one or more other persons to

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[28] Under 18 U.S.C. §1426(a) it is a crime to falsely make or forge any paper or document relating to registry of aliens. A defendant can be convicted under 18 U.S.C. §371 when he conspires with one or more persons to commit a crime.

commit an offense. In this case, however, the overlap between the conspiracy charge and the substantive counts of forgery was substantial. The original indictment charged Krezdorn with conspiring to forge the signature "Valdez" on border-crossing applications for four members of the Ruiz family. Arnulfo Contreras was the individual who allegedly sold the forged applications to the Ruiz's. The superseding indictment reiterates the original four forgery counts and adds a charge that defendant Krezdorn conspired with Arnulfo Contreras to forge the signature "Valdez" on border-crossing applications. Among the "overt acts" allegedly committed in furtherance of the conspiracy are the forgeries on the Ruiz family's applications which form the basis for the four counts of violating 18 U.S.C. §1426(a). For all

practical purposes, the superseding indictment increases by five years imprisonment and a ten thousand dollar fine the potential punishment faced by defendant Krezdorn for the same basic criminal behavior of selling forged border-crossing applications.[29] Therefore, in striking a balance between the competing interests in this case, we will give greater weight to the defendant's Due Process right to appeal his conviction without apprehension of increased punishment than to the

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[29] In contrast, Hardwick provides an example of charges added for relatively discrete criminal behavior. In Hardwick, the original indictment charged defendant with robbing a bank and assaulting police officers in the course of the robbery. The superseding indictment charged the defendant with different and distinct criminal activity: robbery of a bank customer and assaulting a bystander in the course of fleeing the robbery.

prosecutor's interest in maintaining unfettered discretion to increase the charges against the defendant. See Jackson v. Walker, 585 F.2d at 145. The prosecutor can rebut the presumption of prosecutorial vindictiveness arising from the more severe indictment only by showing that the decision to charge conspiracy was based upon new facts or evidence not known to the Government at the time of the original indictment. Evidence that the Assistant United States Attorney harbored no subjective animus or ill will toward the defendant will not be sufficient.

There is an additional factor in this case which causes us to be more concerned with the defendant's apprehension of vindictiveness than with the prosecutor's subjective motivation. Defendant Krezdorn appealed his conviction to this Court, and

obtained a reversal of the conviction because of the admission of extrinsic evidence. The prosecutor then sought to have the same extrinsic evidence admitted on retrial by charging another crime carrying a more onerous punishment. As the district court found, "[t]he very right vindicated on appeal is the basis of the prosecutor's decision to add a new count to the superseding indictment." From the defendant's vantage point, the prosecutor is attempting to turn a successful appeal into a pyrrhic victory. Clearly, the prosecutor's decision has a chilling, even arctic, effect on the defendant's decision to avail himself of the appellate process.

We find that the superseding indictment, obtained immediately after defendant's successful appeal of his first conviction, created an apprehension of

retaliation against defendant for exercising his right to appeal. A presumption of prosecutorial vindictiveness was therefore justified. See U.S. v. Goodwin, 102 S.Ct. at 2488-94. Because the superseding indictment concerned substantially the same basic behavior which formed the basis for the first indictment, we are concerned not with a prosecutor's decision to bring additional charges for distinct criminal acts, but only with a "prosecutor's right to reopen a previously completed exercise of discretion." Jackson v. Walker, 585 F.2d at 144. Moreover, the prosecutor's decision in this case to increase the charges against defendant for the purpose of admitting extrinsic evidence previously ruled inadmissible by this Court has an especially chilling effect on the right of appeal. Therefore, our focus is on the

defendant's right, under the Due Process Clause, to be free from the apprehension of vindictiveness, rather than on the prosecutor's subjective motivation. See U.S. v. Andrews, supra. Accordingly, the burden shifted to the prosecutor to dispel the appearance of vindictiveness; in other words, to explain the increased charges by reference to newly-discovered facts or evidence.[30] This the prosecutor failed to

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[30] On appeal, the Government has suggested that the superseding indictment can be justified as simply an effort to comply with this Court's analysis of the law applicable to defendant's case. In U.S. v. Krezdorn, 639 F.2d 1327 (5th Cir. 1981), we rejected the prosecutor's contention that certain extrinsic evidence was admissible to establish a plan or scheme. However, we observed in a footnote, that, "[t]he existence of a plan would be directly at issue in, for instance, a conspiracy charge." Krezdorn, supra at 1331 n. 7. Our dicta in Krezdorn was an effort to clarify the law related to

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do. The district court found that the prosecutor knew of Contreras' involvement with Krezdorn prior to the time the

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admissibility of evidence of "other crimes" under Fed.R.Evid. 404(b); it was not an "instruction" to the Government to reindict this particular defendant on conspiracy charges. Moreover, even a direct suggestion from the bench relating to retrial would not necessarily justify increased charges. In U.S. v. Motley, 655 F.2d 186 (9th Cir. 1981), defendants were originally indicted and tried on charges of racketeering and conspiracy. The district judge declared a mistrial, and advised the Government to simplify its case for retrial. The Government reindicted defendants on the underlying substantive crimes of possession of drugs and firearms. The superseding indictment involved a potentially greater term of imprisonment. The Court held that the prosecutor did not adequately rebut the presumption of prosecutorial vindictiveness by explaining that the charges were reformulated in response to the trial court's suggestions, when the new charges carried a more severe penalty. U.S. v. Motley, 655 F.2d at 189. The fact that the drafter of the second indictment did not realize it exposed defendant to a more severe penalty was similarly rejected as an adequate rebuttal. Id. at 189-90.

prosecutor obtained his original indictment. The decision to include the conspiracy charge in the second indictment was not based on the discovery of any new facts or evidence relating to conspiracy which were unknown to the prosecutor originally. Therefore, the addition of the conspiracy count was constitutionally impermissible.

4. CONCLUSION

The judgment of the district court is AFFIRMED.

JOHN R. BROWN, Circuit Judge, dissenting:

I do not join in the majority's opinion because I think it is in conflict with controlling decisions of the Supreme Court. I think it also is in conflict with some of our own decisions which are binding on all of us until and unless altered by

the court en banc. It also transgresses accepted principles of judicial restraint in the review of matters within prosecutorial discretion. It does not give adequate recognition to the principles which give rise to the doctrine of prosecutorial vindictiveness. And significantly it does not give full consideration to the facts and the findings of the district court in the instant case.

What the majority has done in this case is to foreclose for all time the prosecutor's option to bring additional charges against a criminal defendant who has been successful on appeal unless it can be shown that the new charges arise from facts totally different from and unrelated to those upon which the original indictment was based. Ante at 1229. It matters neither how serious the criminal conduct

engaged in by the defendant, nor how strong the evidence is against him. It does not matter that the appellate victory is based on an issue unrelated to the substantive offense such as improper jury selection, or improper jury instructions, or as here, improper evidentiary rulings. Nor does it matter what the public outcry is against the conduct charged or that the defendant showed no remorse for his conduct. The rule in this case--and a harsh one it is--which defense attorneys, defendants, and enlightened as well as grudging prosecutors alike must come to terms with is a simple one, but has costs associated with it that only a utopian society can afford. The majority's ruling is absolute. Per se. Total. Complete. Unequivocal and Draconian. I do not believe that any decision of the Supreme Court or of this

Circuit contemplates such substantial costs to be paid by the society when it is undisputed that vindictiveness on the part of the prosecutor is lacking.

In North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), the Supreme Court held that a sentencing judge was precluded from imposing a harsher penalty on a criminal defendant upon retrial after successful appeal unless his reasons for doing so are stated affirmatively in the record. Similarly, Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974) was an extension of this rule to prosecutors in their charging decisions. In Blackledge, the Court concluded that "due process also requires that a defendant be freed of apprehension of ... a retaliatory motivation on the part" of the prosecutor,

Id. at 28, 94 S.Ct. at 2102, just as he must be freed of the apprehension of retaliatory motivation on the part of the trial judge. North Carolina v. Pearce, 395 U.S. at 725, 89 S.Ct. at 2080.

United States v. Goodwin, ____ U.S. ____, 102 S.Ct. 2485, 2495, 73 L.Ed.2d 74 (1982) is not to the contrary. In Goodwin, the Supreme Court held that a presumption of prosecutorial vindictiveness is not warranted where a prosecutorial response to a criminal defendant's exercise of a procedural right occurred pretrial absent a showing that the prosecutor's charging decision was motivated by a desire to punish him for exercising a legal right. So far, so good. There is no argument with the majority over these holdings. The point at which the majority and I diverge, however, is the glossy sheen to be placed

on other dictum in Goodwin which states that "a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision." Id. ____ U.S. at ____, 102 S.Ct. at 2493, 73 L.Ed.2d at 85. I read this dictum as suggesting only that a post-trial prosecutorial decision to increase charges must be scrutinized more carefully than a pretrial decision lest the former was made to punish a defendant for exercising a legal right. This is all this dictum stands for.

Though it never explicitly acknowledges it, the majority construes this dictum to mean that an irrebuttable presumption of prosecutorial vindictiveness abounds whenever a prosecutor increases charges after a defendant has successfully appealed. See ante at 1229. One should

not be mislead by the majority's attempt to evaluate the prosecutor's action in light of the standard that the presumption can be rebutted by objective evidence. Such an evaluation is no more than an empty gesture, for in light of today's decision and in practically all cases where the prosecutor enhances charges upon remand of a case after a defendant's successful appeal, a defendant can allege statements which will tend to impute improper prosecutorial motive when the charges are based on the same nucleus of criminal conduct which gave rise to the original charge.

This is why in our decisions we have held that "[a]n increase in the severity or number of charges if done without vindictiveness may [be justified by simple] explanation." Hardwick v. Doolittle, 558 F.2d 292, 301 (5th Cir. 1977), cert.

denied, 434 U.S. 1049, 98 S.Ct. 897, 54 L.Ed.2d 801. When it is shown that the number of charges has been increased or the severity of the potential sentence has increased after a successful appeal, the criminal defendant has established a prima facie case. Id. But the prosecutor may rebut this prima facie case by demonstrating that his purpose for increasing the severity of the charges was due to some objective reason and not to punish a defendant for the exercise of a legal right. Id.

We have also indicated that explanations categorically sufficient to rebut a presumption of vindictiveness include (i) mistake in the prosecutor's initial action or charging decision, (ii) oversight in the first trial or charging decision made by the prosecutor, (iii) a different approach

to prosecutorial duty by a successor prosecutor, (iv) a public demand for prosecution on the additional crimes alleged. Id. at 301. This list is only illustrative, not exhaustive. What this amounts to and all the Supreme Court opinions discussing the doctrine of prosecutorial vindictiveness is a recognition that a presumption of vindictiveness is anything but irrebuttable. it can be overcome by showing that the prosecutor's action was not prompted by impermissible motives.

Our decision in Jackson v. Walker, 585 F.2d 139 (5th Cir. 1978) does not undermine our decision in Doolittle. It simply employs a balancing test of the prosecutor's discretion and the defendant's right to appeal when the prosecutor has added on charges which relate to the same

basic criminal activity which was the subject of the original indictment. In applying this test, we simply determine whether we should forbid the prosecutor to increase the sentence because it may have a chilling effect on the exercise of a criminal defendant's right to appeal or whether objective nonvindictiveness explanations can be given for the prosecutor's action. It is a weighing of factors which we look to. Our examination of the prosecutor's action necessarily looks to whether or not his action gives rise to a "realistic likelihood of vindictiveness." Blackledge v. Perry, 417 U.S. at 27, 94 S.Ct. at 2102. (emphasis supplied). Thus, we reaffirmed in Jackson our insistence that "a court should not interfere with the prosecutor's exercise of discretion unless a determination of actual

vindictiveness is made. Jackson v. Walker, 585 F.2d at 148. (emphasis supplied).

Our requirement in Jackson that a showing of actual vindictiveness be made actually foreshadowed Goodwin. In Goodwin, the Supreme Court emphasized that there was never a showing made in the district court that the prosecutor in that case had engaged in actual vindictiveness. See United States v. Goodwin, ____ U.S. at ____, 102 S.Ct. at 2493, 73 L.Ed.2d at 85. Absent a showing of actual vindictiveness a court should be hard pressed to find that a prosecutor's action has been vindictive, i.e., served to punish a defendant for the exercise of a legal right. Because of the majority's complete disregard of the import of the decisions in Jackson, Doolittle, and Goodwin, my views would be portrayed to be at odds with the decisions themselves.

Such is not the case, however. Time and again the Supreme Court has iterated that

> The due process violation in cases such as Pearce and Perry lay not in the possibility that a defendant might be deterred from the exercise of a legal right, but rather the danger that the State might be retaliating against the accused for lawfully attacking his conviction.
>
> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the state to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'

Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 667, 54 L.Ed.2d 604, 610 (1978) (citations omitted).

Thus, I conclude that a presumption of vindictiveness cannot continue to operate when the prosecutor has shown that increased charges upon remand after a criminal defendant's successful appeal were not prompted by an improper motive. It is only when the prosecutor acts out of a desire to punish a criminal defendant for an exercise of a legal right, can there actually be a "realistic likelihood of vindictiveness."[1] The core concern of all

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[1] Because I reach this conclusion based on the controlling precedent, it simply confounds common sense and good law practice to suggest, upon the facts of this or similar cases, that defendants or defense counsel will in the future fail to object at trial to what they consider

(Footnote Continued)

the decisions on prosecutorial vindictiveness is that the government not penalize a criminal defendant for exercising a constitutional right. That is all, plain and simple. No other fancy explanation of the decisions is needed.

Even the possibility of a harsher sentence, standing alone, is not

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(Footnote Continued)
prejudicial evidentiary submissions or to appeal what they consider clearly erroneous evidentiary rulings--the only standard by which an appellate court can reverse a questionable evidentiary ruling--out of some supposed apprehension of prosecutorial retaliation. That presumption is fallacious not only because of its untruth, but also because it wholly fails to consider the consequences of a defendant's failure to object or appeal from what he considers prejudicial evidentiary rulings. The consequences are oppressive. A failure to object renders the issue unreviewable on appeal, a cost I think most competent counsel and defendants are unwilling to pay. Second, the stakes in a criminal trial are simply too high for a defendant to play possum on an erroneous evidentiary
(Footnote Continued)

impermissible.[2] The "constitutional

(Footnote Continued)
submission. For instance, without particular evidence, a jury might be bereft of any evidence upon which to peg a guilty verdict. Therefore, no counsel or defendant in his right mind would forego an objection since the possibility of acquittal is not remote.

Likewise, it would be foolhardy for counsel to forego a non-frivolous appeal based on improper evidentiary rulings. A victory on appeal would have the same effect as a sustained objection at trial to an admission of evidence. Without the excluded evidence a conviction may stand a good chance of reversal based on evidentiary insufficiency, which would foreclose any possibility of additional charges or a new trial because of double jeopardy precepts. See Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978).

[2] Make no mistakes, I am not of the view that a prosecutor is free to do whatever he wants in the reindictment of a defendant upon remand after successful appeal. He is still to act in a manner consistent with the Constitution, the Canons of Ethics, and never in contravention of established legal principles, and rarely, if ever, should he

(Footnote Continued)

validity of higher sentences in the absence of vindictiveness" is not in doubt "despite whatever incidental deterrent effect they might have on the right to appeal." Chaffin v. Stynchcombe, 412 U.S. 17, 29, 93 S.Ct. 1977, 1984, 36 L.Ed.2d 714, 725 (1973); Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970);

(Footnote Continued)
be oblivious to departmental policy and the possibility of "fundamental unfairness" being dealt to the criminal defendant because of callous and careless action on the part of the prosecutor. Whatever reservations I express to giving the prosecutor carte blanche in his charging decisions upon retrial, and suggested constraints the legal profession places on him, the foremost concern of the Constitution is that he not endeavor to punish a criminal defendant for the exercise of a legal right. More constraints than these on the prosecutor's discretion is a gratuity to the criminal defendant. But the prosecutor may always recall that he is to protect public interest, prosecute fairly but with zeal, persons indicted for criminal conduct.

Parker v. North Carolina, 397 U.S. 790, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970); Cf. McGautha v. California, 402 U.S. 183, 213, 91 S.Ct. 1454, 1470, 28 L.Ed.2d 711, 729 (1971).

Hence, when the inquiry is focused (as it should be) on the penal purpose of the prosecutor's action in this case, it is clear that there is none. The district court explicitly found that "[i]n having the superseding indictment returned, the government was not concerned with increasing the amount of punishment to which the defendant would be exposed." Frankly, I find it unnecessary to go beyond this determination. If no impermissible motive can be attributed to the government in its reindictment of Krezdorn, then its action passes constitutional muster. Implicit in this finding is a rejection of

any contention of vindictiveness on the part of the prosecutor. The court also found as fact that the "primary, if not sole, purpose of the government in having a superseding indictment returned was to overcome the Fifth Circuit's objection to the [erroneous introduction of the 32 forgeries into evidence.]" The district court further explained and found that "the government's purpose was to make evidence of these extraneous forgeries admissible as overt acts in a conspiracy between the defendant Krezdorn and a [co-conspirator]." The court also found that the prosecutor did not even think that the additional charge of conspiracy would result in Krezdorn receiving a punishment in excess of the one given him at the initial trial. What is even more interesting about the facts of this case is that this charging

decision upon retrial could well be laid to this Court's suggestion that the evidence possibly would be admissible in a conspiracy charge. United States v. Krezdorn, 639 F.2d 1327, 1331 n. 7 (5th Cir. 1981).

Despite these rather clear factual findings, the majority chooses to uphold the legal conclusion of the district court that "[t]he fact that the prosecutor here is not concerned with increasing the defendant's punishment or the fact that the defendant's punishment may not be actually increased is not determinative." With profound respect to the experienced district judge, I submit that this conclusion is profoundly wrong and the majority's implicit adoption of it engenders the profoundest bewilderment. It simply makes no sense to say that there is

present in this case prosecutorial vindictiveness--a constitutionally impermissible reaction of the prosecutor to punish a defendant after he has successfully appealed--and find it totally irrelevant for all practical purposes that the prosecution did not seek to punish Krezdorn for exercising his right of appeal, i.e., engage in prosecutorial vindictiveness. The prosecutor either did or he did not. But the majority, in upholding the district court, concludes that he did and did not. This, or course, makes no sense. Since the prosecutor offered an explanation which was eminently reasonable and fully credited by the district judge for his charging decision after retrial, this explanation should suffice. In fact, any other explanation for the prosecutor's responsive action

which is offered to rebut the presumption would seem to suffice because it is not motivated by a desire to punish. See Hardwick v. Doolittle, 558 F.2d at 301.

More than has been said need not be said. I think the majority reached the wrong conclusion on these facts. Additionally, the law as it now stands ought to allow the prosecutor's action here to go unchallenged, unchanged and unreprimanded in view of the total and complete absence of a finding of actual vindictiveness. Because the district court found quite clearly and well with the imprimatur of Rule 52(a) that the prosecutor was not motivated to punish Krezdorn for exercising a right to appeal, I would hold that the judge's legal conclusion of prosecutorial vindictiveness is incompatible with his factual finding. It certainly does not

permit us as an appellate court to disregard this factual finding and then leap to the dubious conclusion that the prosecutor's action had to be, although in fact it was not, vindictive.

I must, therefore, respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	DR-79-CR-6
	§	
HERMAN V. KREZDORN	§	

ORDER DISMISSING COUNT ONE OF SUPERSEDING INDICTMENT

Pending is the defendant's motion to dismiss Count 1 of the superseding indictment filed against him on June 17, 1981, on the ground of vindictive prosecution. For the reasons hereafter stated, the motion will be granted.

The defendant, a United States Immigration Inspector, was originally indicted for 5 counts of forging the signature of another inspector on applications for border-crossing cards, in violation of 18 U.S.C. §1426(a). At the original trial, the court directed an

acquittal of the defendant on Count 5, but the jury convicted him on Counts 1 through 4. The Fifth Circuit reversed the convictions on Counts 1 through 4 because of this court's admission into evidence of 32 additional forgeries not charged in the original indictment (and expert testimony that they were forged by the defendant). The Fifth Circuit found that such evidence was not admissible under the "plan or scheme" exception to the general rule excluding the admission of "other crimes" evidence under Fed.R.Evid. 404(b). United States v. Krezdorn, 639 F.2d 1327 (5th Cir. 1981). The Fifth Circuit found that the additional forgeries did "not tend to establish the existence of a larger goal of which the four charged forgeries were only a part." Id., 639 F.2d at 1331. The Fifth Circuit noted, however, that "[t]he

existence of a plan would be directly at issue in, for instance, a conspiracy charge." Id., 639 F.2d at 1331 n. 7.

Following reversal, the government re-indicted the defendant. In addition to the four substantive offenses that the defendant had previously been convicted of, the superseding indictment charged the defendant with conspiring with Arnulfo Contreras[1] to forge signatures on applications for border-crossing cards. As overt acts in the conspiracy, the new indictment alleged, among others, the 32 forgeries whose admission into evidence had

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[1] The alleged beneficiaries of the 5 forgeries that were the subject of the original indictment were members of the Ruiz family. Contreras is the individual whom all 5 members of the Ruiz family allegedly paid money to obtain border-crossing cards for them.

resulted in a reversal of the first trial. The defendant contends that the conspiracy charge, which increases his maximum exposure by 5 years and a $10,000 fine, constitutes retaliation against him for exercising his right to appeal from his original convictions.

On July 20, 1981, the court held an evidentiary hearing on the defendant's motion to dismiss. Following are the court's findings of fact and conclusions of law.

Findings of Fact

1. Because two prosecutors were involved in the case at various times, it is unclear exactly what evidence was in the possession of the government at the time that the original indictment was returned. Nevertheless, it is clear that the government knew of the involvement of

Arnulfo Contreras prior to the return of the original indictment. The government decided not to indict Contreras originally, because he was a Mexican citizen; consequently, the government knew he could never be extradited and, if indicted, would simply clutter up court records as a fugitive.

2. In having the superseding indictment returned, the government was not concerned with increasing the amount of punishment to which the defendant would be exposed. It is the prosecutor's impression that, even if the defendant is convicted of the conspiracy offense, he will not receive any punishment in excess of what he received after the first trial.[2]

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[2] The prosecutor did not gain this
(Footnote Continued)

3. The primary, if not sole, purpose of the government in having a superseding indictment returned was to overcome the Fifth Circuit's objection to the introduction of the 32 extraneous forgeries. The government's purpose was to make evidence of these extraneous forgeries admissible as overt acts in a conspiracy between the defendant and Contreras.

Conclusions of Law

1. The law in the Fifth Circuit regarding vindictive prosecution is summarized as follows: ". . . Once a prosecutor exercises his discretion to bring certain charges against a defendant, neither he nor his successor may, without explanation, increase the number of or severity of those

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(Footnote Continued)
impression by any communication from the court.

charges in circumstances which suggest that the increase is retaliation for the defendant's assertion of statutory or constitutional rights." Hardwick v. Doolittle, 558 F.2d 292, 301 (5th Cir. 1977), cert. denied, 434 U.S. 1049 (1978). "...[W]hen an accused is convicted and successfully exercises his statutory or constitutional rights to obtain direct or collateral relief from the conviction, a state may not marshal more numerous or severe charges against the defendant in order to punish him for availing himself of appropriate remedies or discourage future defendants from a similar exercise of their rights." Miracle v. Estelle, 592 F.2d 1260, 1272 (5th Cir. 1979).

"The advancement of a prosecutorial vindictiveness claim brings into conflict two antithetical interests: (1) the due

process right of the defendant to be free of apprehension that the state might subject him to an increased potential punishment if he exercises his right to make a direct or collateral attack on his conviction, and (2) the prosecutor's broad discretion to control the decision to prosecute. ... Because of the societal importance of both policies, the actual showing an accused must make to establish a due process violation depends on a careful balancing of the defendant's interest against that of the state." Id., 592 F.2d at 1272-73.

". . .[I]n some situations a due process violation can be established by a showing that defendants might have a reasonable apprehension of prosecutorial vindictiveness, without a showing that the prosecutor actually had a vindictive or

retaliatory motive to deter appeals." Jackson v. Walker, 585 F.2d 139, 143 (5th Cir. 1978). On the other hand, "in some cases the apprehension of vindictiveness is sufficient only to establish a prima facie showing of unconstitutional vindictiveness. Upon this showing, the burden shifts to the state to demonstrate that the reason for the increase in charging was other than to retaliate against the defendant for the exercise of her legal rights. If the state fails to meet this burden, the court must find actual vindictiveness and a violation of the due process clause." Id., 585 F.2d at 142 (footnote omitted).

The term "actual vindictiveness" is misleading. "For a prosecution to be unconstitutional, it is not necessary that the prosecutor bear any ill will toward the particular defendant in the case. The

unconstitutional motive may be simply the prosecutor's intent to discourage other criminal appeals in the future by 'upping the ante' in the current appeal, even though he feels no particular malice for the current defendant. Of course, a prosecutor may also intend to punish the current defendant for appealing. The terms 'malice' and 'vindictiveness' more accurately describe only the latter motive, but the due process clause proscribes both motivations." Id., 585 F.2d at 142 n. 3.

The government may meet its burden of proving that the reason for an increase in charging was other than vindictiveness in many ways. "For example, evidence of the additional crimes may not have been obtained until after the first indictment or information is filed, or the additional crime may not be complete at the time

charges are first brought. And a prosecutor may, without explanation, refile charges against a defendant whose bargained-for guilty plea to a lesser charge has been withdrawn or overturned on appeal, provided that an increase in the charges is within the limits set by the original indictment. Other explanations which would negate vindictiveness could include mistake or oversight in the initial action, a different approach to prosecutorial duty by the successor prosecutor, or public demand for prosecution on the additional crimes allegedly committed. The list is intended to be illustrative rather than exhaustive." Hardwick v. Doolittle, 558 F.2d at 301 (footnotes omitted).

"The threshold question is whether, for a finding of unconstitutional

vindictiveness, a court will require a determination of actual vindictiveness, or just a finding of the reasonable apprehension of vindictiveness. To answer this question, a court must balance the 'freedom of discretion' interest of the prosecutor." Jackson v. Walker, 585 F.2d at 144.

"The test can be summarized as follows. In deciding whether to require a showing of actual vindictiveness or merely a showing of reasonable apprehension of vindictiveness, a court must weigh the extent to which allowing the second indictment will chill the exercise of the defendants' appeal rights against the extent to which forbidding the second indictment will infringe on the exercise of the prosecutor's independent discretion. In other words, the court must weigh the

need to give defendants freedom to decide whether to appeal against the need to give the prosecutors freedom to decide whether to prosecute." Id., 585 F.2d at 145.

2. When a prosecutor adds a new charge for relatively distinct criminal conduct - whether it occurred in the same "spree of activity" as the original charges or not - usually, a determination of actual vindictiveness is required for a due-process violation to be found. See United States v. Thomas, 593 F.2d 615, 624 (5th Cir.), modified on rehearing, 604 F.2d 450 (5th Cir. 1979), on appeal after remand, 617 F.2d 436 (5th Cir. 1980), cert. denied, 101 S.Ct. 120; Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977), cert. denied, 434 U.S. 1949 (1978); United States v. Nell, 570 F.2d 1251 (5th Cir. 1978); United States v. Jones, 587 F.2d 802 (5th Cir.

1979); Jackson v. Walker, 585 F.2d 139 (5th Cir. 1978). On the other hand, when a prosecutor substitutes a more severe charge for the same criminal conduct, a reasonable apprehension of vindictiveness is usually sufficient to make out a due-process violation. See Miracle v. Estelle, 592 F.2d 1269 (5th Cir. 1979). See also United States v. Andrews, 633 F.2d 449, 453 n. 4 (6th Cir. 1980).

3. The fact that the prosecutor here is not concerned with increasing the defendant's punishment or the fact that the defendant's punishment may not be actually increased is not determinative. ". . .[T]he severity of an alleged offense is not determined by the actual punishment imposed but by the potential punishment for the offense, viewed prospectively." Miracle v. Estelle, 592 F.2d at 1275.

4. In this case the defendant has established at least a prima facie case of vindictive prosecution by showing the government's addition of the conspiracy count after the defendant had exercised his right to an appeal. However, the court need not decide whether this prima facie showing of a reasonable apprehension of vindictiveness is sufficient to establish a due-process violation. Even if the effect of the defendant's prima facie showing is only to shift the burden to the government to demonstrate a non-retaliatory motive, the court finds that the government has failed to carry its burden.

Here, the government's self-professed purpose for adding the conspiracy count was to make admissible, evidence whose admission was the prime ground for the defendant's appeal and actually caused a

reversal of the first trial. The prosecutor believed that evidence of the 32 extraneous forgeries was admissible at the first trial pursuant to the "plan or scheme" exception in Fed.R.Evid. 404(b); in fact, he convinced this court that his view of the law was correct. However, the Fifth Circuit disagreed and reversed the case on this error. Now, relying on the implication in footnote 7 of the Fifth Circuit opinion, the prosecutor has added a conspiracy count to endeavor to make admissible that which was not admissible before. In short, the very right vindicated on appeal is the basis of the prosecutor's decision to add a new count to the superseding indictment.

In this regard, it is well to remember what is really meant by actual vindictiveness. It "is not necessary that

the prosecutor bear any ill will toward the particular defendant in the case. The unconstitutional motive may be simply the prosecutor's intent to discourage other criminal appeals in the future by 'upping the ante' in the current appeal. . ." Jackson v. Walker, 585 F.2d at 142 n. 3. If the first trial had been reversed for any reason other than the admission of the 32 extraneous forgeries, this court would have little trouble in concluding that the government's motive was not in retaliation for appeal. However, when the added conspiracy count is directed at "getting around" an evidentiary obstacle that was created by the appeal, the court cannot find that the government has met its burden.

5. Accordingly, the defendant's motion to dismiss Count 1 of the superseding indictment is granted.

SO ORDERED this 28th day of July, 1981.

/Signed/ D. W. Suttle
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES Of America,
Plaintiff-Appellee,

v.

Herman V. KREZDORN,
Defendant-Appellant.

No. 79-5427.

United States Court of Appeals,
Fifth Circuit.
Unit A

March 19, 1981.

Appeal from the United States District Court for the Western District of Texas.

Before GOLDBERG, POLITZ and SAM D. JOHNSON, Circuit Judges.

SAM D. JOHNSON, Circuit Judge:

Appellant Krezdorn, a United States Immigration Inspector, was indicted and charged with falsely making and forging the signature of another inspector on the

applications for border crossing cards of five nonresident aliens in violation of 18 U.S.C.A. §1426(a). In this appeal from his conviction on four of the counts, defendant-appellant contests two evidentiary rulings made by the district court: (1) Admission of thirty-two additional forgeries not charged in the indictment (and expert testimony that they were forged by Krezdorn), and (2) admission of evidence that the aliens whose applications Krezdorn was charged with forging acquired their border crossing cards by making illegal payments to a third party unrelated to defendant. Since it constituted reversible error for the district court to admit evidence of the thirty-two additional forgeries, we reverse and remand for a new trial.

A border crossing card, also called a Form I-186 and commonly referred to as a local card, is issued by the Immigration and Naturalization Service (INS) and allows a Mexican national to enter the United States for up to seventy-two hours at a time within a radius of twenty-five miles of the border.[1] Application for a border crossing card is made by use of a Form I-190, which can be obtained free of charge at a number of places, including Mexican Chambers of Commerce. To obtain an application form (Form I-190), the applicant must present a Mexican Form 13, a provisional passport that can be obtained at no cost from a Mexican

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[1] An alien who intends to live in the United States is not eligible for a Form I-186.

Immigration Officer.[2] The applicant's biographical data is ordinarily typed on the Form I-190 at the Chamber of Commerce. After obtaining the I-190 application form, the applicant must present the provisional passport, the Form I-190, and a photograph to a contact representative at the point of entry in the United States (in this case, Eagle Pass, Texas). An interview with a United States Immigration Inspector is conducted and, if the application is approved, the inspector will so indicate on the Form I-190 and will instruct the applicant to return in forty-five days to pick up his border

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[2] In practice, Mexican officials often charge for the Form 13 and the Form I-190.

crossing card.[3] The Immigration Inspector signs the application and sends the form to Washington to be indexed. If no adverse information on the applicant is received during the forty-five day waiting period, the border crossing card is prepared by clerical personnel and issued by the contact representative.

Several members of the Ruiz family, all Mexican citizens, did not follow these procedures. On two separate occasions, each of five members of the Ruiz family paid 2500 Mexican pesos to Arnulfo Contreras, a resident of Piedras Negras, a

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[3] If an applicant must cross the border during the 45-day waiting period, he may obtain a temporary border crossing card. In that situation, the United States Immigration Inspector will give the alien a stamped copy of the Form I-190 attached to the Mexican Form 13 to use as a temporary card.

Mexican border town across the Rio Grande River from Eagle Pass, Texas, to obtain their I-186 border crossing cards. Contreras helped the Ruiz family to acquire and complete their Form I-190's and Form 13's. The Ruiz family members did not then deliver their Form I-190's to the INS in Eagle Pass, but instead submitted them to Contreras in Piedras Negras. They were instructed by Contreras to return and pick them up from him a number of days later.[4] They followed

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[4] Two members of the Ruiz family were instructed to return in ten days and the other three were instructed to return in six weeks. Thus, they failed to have an interview with an Immigration Inspector, have their I-190 forms placed on file in Washington, or complete the obligatory 45-day waiting period. Had the required interview been conducted, it would have been discovered that the Ruizes were not eligible to receive border

(Footnote Continued)

these instructions. Upon return of the forms from Contreras at the appointed times, the applicants took the forms directly to the port of entry at Eagle Pass and immediately received their border crossing cards. The I-190 forms received by the members of the Ruiz family appeared to have been signed by United States Immigration Inspector Francisco Valdez of Eagle Pass; however, Valdez denied ever signing them.

Appellant Krezdorn, an Immigration Inspector at the port of entry at Eagle Pass, Texas, was charged with five counts of forging Valdez's signature on the five I-190 applications. After the court

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(Footnote Continued)
crossing cards since they intended either to live in the United States or to work in the United States at a distance further than 25 miles from the border.

directed an acquittal of Krezdorn on one count,[5] the jury found him guilty on the remaining four counts. The district court, over objection, admitted into evidence thirty-two additional I-190 forms that bore the forged signature of Valdez. These thirty-two I-190 forms were not cited or referred to in the indictments returned against Krezdorn. The court

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[5] The indictment charged Krezdorn with forging the applications of: Count 1-- Alfonso Romo-Ruiz, Count 2--Jesus Romo-Ruiz, Count 3--Eleazar Ruiz-Romo, Count 4--Alfonso Ruiz-Romo, and Count 5--Zulema Romo-de Ruiz. Count 4 was actually intended to refer to Alonso Ruiz-Romo, Alfonso's twin brother. Alfonso's name had, however, been typed incorrectly on his I-190 as Alfonso.

The court directed an acquittal of Krezdorn on Count 5 because the signature of the Immigration Inspector did not appear on the carbon copy of the I-190 form in the government's possession. This opinion will henceforth refer only to four charged forgeries.

admitted expert testimony that all of these applications, the four referred to in the indictment and the thirty-two not referred to in the indictment, were forged by Krezdorn. The thirty-two additional I-190 forms were ruled admissible under the plan or scheme exception to the extraneous offense rule, and a limiting instruction to this effect was given.[6]

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[6] When the thirty-two extrinsic forgeries, designated exhibits 30 through 62, were introduced, the trial judge gave the jury the following limiting instruction:

> You are instructed that you are called upon to determine the defendant's guilt or innocence solely with respect to the offenses charged in the Indictment. That's the five counts that I explained to you at the beginning of the trial. They're the five counts that the defendant is on trial for.
>
> And, so I'll call your attention that you're instructed that you're called upon to determine the defen-

(Footnote Continued)

(Footnote Continued)

dant's guilt or innocence solely with respect to those five offenses charged in the Indictment.

I have admitted this evidence and testimony in regard to these exhibits 30 through 62, inclusive, relating to the alleged commission of offenses similar to those charged in the indictment, but at different times, different dates.

This evidence has been admitted for a limited purpose--this evidence as to the alleged similar offenses has been admitted solely to establish a consistent plan or scheme, if any, on the part of the defendant.

You are to determine the defendant's guilt or innocence only as to the specific offenses charged in the Indictment. You must not convict the defendant of the offense charged in any one count of the Indictment, unless you are convinced beyond a reasonable doubt, that he committed the specific offenses charged.

Remember the defendant is not on trial for any acts or offenses not alleged in the Indictment, and that these exhibits 30 through 62 are admitted solely for your consideration in determining whether or not the evidence is a plan or scheme, if any. He's not on trial for these particular offenses, just whether or not the evidence to you is a plan or scheme, if any.

You'll be the one to determine that fact.

At the close of the evidence, the trial judge reminded the jury of this limiting instruction and repeated it in part.

The court also allowed the introduction of evidence of the payment of 2500 Mexican pesos from each of the Ruizes to Contreras. The only evidence of monetary payments introduced at trial was the testimony of the Ruiz family in explanation of the procedures they followed to acquire their border crossing cards. There was no evidence of any monetary payments to anyone with respect to the thirty-two extrinsic forgeries. The trial court found, however, that the testimony regarding the extraneous forgeries and the payments to Contreras were "so linked together in point of time and circumstances with the crimes charged that one cannot be fully shown without proving the other."

I. The Thirty-Two Extrinsic Forgeries

The admissibility of the thirty-two

extrinsic forgeries is governed by Rule 404(b) of the Federal Rules of Evidence, which states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Fed.R.Evid. 404(b). The rule has been interpreted by this Court in United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979), to establish a two-pronged test for admissibility: (1) Extrinsic offense evidence

must be relevant "to an issue other than the defendant's character" and (2) it "must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of rule 403." Id. at 911 (footnote omitted). The district court found that the evidence of the additional forgeries satisfied both elements of the test: it was relevant to the existence of a plan or scheme and its probative value outweighed its possible prejudice.

Since a "plan" is not an element of the offense with which Krezdorn was charged,[7] evidence showing a plan must be relevant to some ultimate issue in the

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[7] The existence of a plan would be directly at issue in, for instance, a conspiracy charge.

case. The contested issues in this case are (1) whether the signatures of Immigration Inspector Francisco Valdez on the applications were forged and, if so, (2) whether Krezdorn forged them. Evidence of extrinsic offenses can be used, inter alia, to establish the identity of a wrongdoer or the doing of a criminal act by raising a preliminary inference of a plan. For instance, evidence of an extrinsic offense may be admissible when it logically raises an inference that the defendant was engaged in a larger, more comprehensive plan. The existence of a plan then tends to prove that the defendant committed the charged crime, since commission of that crime would lead to the completion of the overall plan. This use of extrinsic evidence to establish the

existence of a plan is allowed by Rule 404(b) because,

> [it] involves no inference as to the defendant's character; instead his conduct is said to be caused by his conscious commitment to a course of conduct of which the charged crime is only a part. The other crime is admitted to show this larger goal rather than to show defendant's propensity to commit crimes.

22 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5244, at 500 (1978) (footnotes omitted).

The thirty-two additional forgeries do not tend to establish the existence of a larger goal of which the four charged forgeries were only a part. The four forgeries for which Krezdorn was indicted show that Krezdorn was engaged in forgery.

That there were thirty-six instead of only four forged I-190's does not establish anything different. It would, at best, merely demonstrate the repetition of similar criminal acts, thus indicating Krezdorn's propensity to commit this crime. Evidence of other crimes is not admissible for this purpose.

The Court in Beechum discussed in some detail another circumstance in which extrinsic evidence would be considered part of a common plan or scheme: "If the uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other, the general rule of exclusion does not apply.'" 582 F.2d at 912 n. 15 (quoting Slough & Knightly, Other Vices, Other Crimes, 41 Iowa L.Rev. 325, 331 (1956).

In the instant case, the district court specifically relied upon this exception to allow the introduction of the contested evidence.

This exception applies when evidence of uncharged offenses is necessary to explain the circumstances or setting of the charged crime; in such a situation, the extrinsic evidence "complete[s] the story of the crime on trial by proving its immediate context of happenings near in time and place."[8] McCormick, Law of

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[8] A closely related concept is that of admitting evidence of an inseparably interrelated uncharged crime because it is viewed as part of the same crime as the charged crime. Since it is part of the charged crime and not a separate crime, Rule 404(b) does not apply to exclude it. See United States v. Aleman, 592 F.2d 881, 885-86 (5th Cir. 1979). "It matters little whether the evidence is viewed as lying beyond the

(Footnote Continued)

Evidence § 190, at 448 (2d ed. E. Cleary 1972) (footnote omitted), quoted in 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 404[16], at 404-85 (1980). The justification for this exception is that the evidence is being admitted for a purpose other than to prove propensity:

> It may be quite impossible to prove the case without revealing other crimes. The court cannot "fragmentize the event under inquiry." If an understanding of the event in question, or if a description of the immediate circumstances reveals other crimes than those charged, exclusion

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(Footnote Continued)
scope of Rule 404, or as satisfying the test of Rule 404(b) since it is being used to enhance the trier's understanding of the event, and not to prove propensity." 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶404[10], at 404-61 (1980).

> will lead to a highly artificial situation at the trial making understandable testimony unlikely.

2 J. Weinstein & M. Berger ¶404[10], at 404-60 (footnotes omitted). Some courts have labeled this exception res gestae, an appellation that tends merely to obscure the analysis underlying the admissibility of the evidence.

The district court admitted the contested evidence at trial pursuant to this exception, stating that the extrinsic offense evidence was "so closely blended and inextricably wound up with the crimes charged as to constitute part of the plan or system of criminal action involved." The trial court misapplied the exception in this instance. The thirty-two extrinsic forgeries are not necessary to explain the circumstances surrounding the forgery

of the four applications for which Krezdorn was charged. Evidence that the defendant allegedly committed the charged crime more times than he was charged with does not constitute part of the "system of criminal action." The admission of this evidence was an abuse of discretion.

Moreover, even if the thirty-two forgeries could somehow be considered relevant to the existence of a plan, the evidence fails to satisfy the second prong of the test for admissibility under Rule 404(b). A primary danger inherent in the admission of evidence of extrinsic offenses is that the jury might, inadvertently perhaps, punish the defendant for the uncharged activity. Here, where the extrinsic evidence involves precisely the crime with which Krezdorn was charged, to allow the introduction of the extrinsic

offense evidence would be to allow the jury to be overwhelmed by the sheer numerosity of the offenses. Thus, not only does the evidence relate only to defendant's character, which is specifically prohibited by Rule 404(b), but in addition, the probative value is substantially outweighed by the unfair prejudice.

II. Monetary Payments to Contreras

At the outset it is to be recalled that each of the four members of the Ruiz family paid 2500 Mexican pesos to Contreras in Piedras Negras. The evidence of the monetary payments to Contreras stands in an entirely different posture than does the evidence of the thirty-two extrinsic forgeries. This evidence involves an extraneous offense committed by a person other than the defendant. Arguably, this

is not the kind of evidence to which Rule 404(b) applies. "The extrinsic acts rule is based on the fear that the jury will use evidence that the defendant has, at other times, committed bad acts to convict him of the charged offense." United States v. Aleman, 592 F.2d 881, 885 (5th Cir. 1979). Consequently, where the only purpose served by extrinsic offense evidence is to demonstrate the propensity of the defendant to act in a certain way, the evidence must be excluded. When, however, the extrinsic offense was not committed by the defendant, the evidence will not tend to show that the defendant has a criminal disposition and that he can be expected to act in conformity therewith. When the evidence will not impugn the defendant's character, the policies underlying Rule 404(b) are inapplicable.

It would seem, therefore, that when extrinsic offense evidence is sought to be introduced against a criminal defendant, in order to trigger the application of Rule 404(b) there must be an allegation that the extrinsic offense was committed by the defendant.[9] We need not decide,

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[9] A number of courts have recognized that in order to satisfy the test of admissibility under Rule 404(b), it must be shown that the defendant committed the extrinsic offense. In reference to situations where extrinsic offense evidence was offered to show the defendant's intent, the Beechum Court stated:

> Obviously, the line of reasoning that deems an extrinsic offense relevant to the issue of intent is valid only if an offense was in fact committed and the defendant in fact committed it. Therefore, as a predicate to a determination that the extrinsic offense is relevant, the Government must offer proof demonstrating that the defendant committed the offense.

582 F.2d at 912-13. See United States v.

(Footnote Continued)

however, whether Rule 404(b) applies to

(Footnote Continued)
Jimenez, 613 F.2d 1373 (5th Cir. 1980); United States v. Brown, 608 F.2d 551, 555 (5th Cir. 1979). The Courts in Jimenez and Brown concluded that the extrinsic offense evidence was inadmissible under Rule 404(b) because there was insufficient proof that the defendants committed the extrinsic acts. In both of those cases, however, the Government offered the evidence of the extrinsic offenses as prior acts committed by the defendants. The evidence was barred by Rule 404(b) because the Government failed to prove with sufficient certainty that the acts actually were committed by the defendants. In the instant case, there is no contention that the extrinsic offense is one committed by the defendant. In such a situation, it would seem that Rule 404(b) is not applicable. Cf. United States v. Bates, 600 F.2d 505, 509 (5th Cir. 1979) ("[I]t is a misnomer to characterize the testimony concerning the acts and backgrounds of the co-conspirators as 'extraneous offense' evidence. The testimony was not evidence of other crimes committed by [the defendant] himself... Rather, the testimony was fully admissible evidence of the existence of an ongoing conspiracy as charged in the indictment."). The Beechum Court itself stated that its "analysis applies whenever the extrinsic activity reflects adversely on the character of the

(Footnote Continued)

this situation since the evidence of the monetary payments is admissible whether or not Rule 404(b) applies.

The district court concluded that the evidence of the payments was relevant to the existence of a common plan between Contreras and Krezdorn. The court further found that the probative value of the evidence was not substantially outweighed by the asserted unfair prejudice. If these findings are upheld, then the evidence of the payments to Contreras is admissible under either Fed.R.Evid. 402 or 404(b).

The district court has broad discretion to evaluate relevancy, and its determination will not be disturbed absent

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(Footnote Continued)
defendant ...." 582 F.2d at 903 n. 1 (emphasis added).

an abuse of discretion. There was no abuse of discretion here. The evidence of payments to Contreras is relevant to the existence of a plan between Krezdorn and Contreras whereby Krezdorn would forge an Immigration Inspector's name on Form I-190's for Contreras to sell. The existence of such a plan, in turn, tends to make it more likely--indeed highly likely--that Krezdorn forged the four charged Form I-190's, since that act would lead to the fulfillment of his overall plan.

To introduce the payments to Contreras against Krezdorn, however, some independent evidence linking Contreras and Krezdorn is required. That the forgeries occurred while the Ruizes' application forms were in the possession of Contreras, together with the substantial evidence

that Krezdorn committed the forgeries, is significant evidence of concerted action between Contreras and Krezdorn. Moreover, excluding from consideration for the moment the evidence that each Ruiz family member paid 2500 Mexican pesos to Contreras in Piedras Negras, the evidence presented at trial also showed that: (1) Each of the Ruizes submitted their Form I-190's, Form 13's, and photographs to Contreras in Piedras Negras rather than to the INS contact representative at Eagle Pass, (2) each failed to have an interview with an Immigration Inspector at Eagle Pass, (3) each picked up their Form I-190's from Contreras in Piedras Negras after a waiting period of less than forty-five days, (4) each application, when it was picked up from Contreras, bore a signature which purported to be that of

United States Immigration Inspector Francisco Valdez, (5) substantial evidence, which was persuasive to the jury, was presented at trial that Krezdorn had forged the name Valdez on each of the four Ruiz applications, and (6) each of the Ruizes took their papers to Eagle Pass and immediately received a border crossing card although each was apparently ineligible for a local card. Despite the lack of direct evidence of an agreement between the two men,[10] the procedures by which the Ruizes acquired their border crossing cards reasonably raises an inference of a

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[10] The only Arnulfo Contreras that Krezdorn admitted knowing was a brick manufacturer in Piedras Negras that he met a number of years earlier when he was contemplating building a house. Krezdorn stated that he had not been in touch with this Contreras for over a year.

plan between Krezdorn and Contreras. Evidence that the name Valdez was forged on the Ruizes' Form I-190's during the time that those forms were in the possession of Contreras, along with the substantial evidence presented at trial that Krezdorn forged the signatures on the applications, tends to show concerted action between Contreras and Krezdorn. Thus, since there was evidence that the two men were engaged in concerted action, the evidence of the payments to Contreras, which is relevant to the existence of a common criminal plan, is admissible against Krezdorn. See United States v. Jimenez, 600 F.2d 1172, 1173 (5th Cir.), cert. denied, 444 U.S. 903, 100 S.Ct. 216, 62 L.Ed.2d 140 (1979). Finally, the district court did not abuse its discretion in reaching its conclusion that

the prejudicial impact of this evidence did not substantially outweigh its probative value. The evidence of the monetary payments to Contreras was properly admitted at trial.

III. Extrinsic Forgeries in Conjunction With Monetary Payments to Contreras

The Government argues that when the evidence of the thirty-two extrinsic forgeries is considered in combination with the evidence of the payments to Contreras, all of the evidence becomes admissible. This contention is not supportable. Viewing this evidence together still does not tend to establish the existence of a plan with respect to the thirty-two additional forgeries. The Government presented no evidence whatsoever that connected the thirty-two uncharged forgeries to Contreras. There was no evidence that any money was paid to

Contreras, or to anyone else, by the people who received these thirty-two forged I-190's. In fact, there was no evidence that these thirty-two people even received the forged I-190's from Contreras. In view of the total absence of any evidence linking these thirty-two extrinsic forgeries to Contreras, the inference that payments to Contreras in the acquisition of the four charged forged applications somehow indicates a plan between Contreras and Krezdorn with respect to the thirty-two uncharged forgeries is unreasonable. Consequently, the inference of a plan with respect to the thirty-two forgeries is still inadmissible.

As the trial court committed reversible error by admitting evidence of the thirty-two extrinsic forgeries at trial,

this case is reversed and remanded for a new trial.

REVERSED AND REMANDED.

No. 83-1115

In the Supreme Court of the United States

OCTOBER TERM, 1983

HERMAN V. KREZDORN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1115

HERMAN V. KREZDORN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order dismissing, on grounds of prosecutorial vindictiveness, a conspiracy count added to a superseding indictment.

In 1979, petitioner, a United States Immigration Inspector, was indicted in the United States District Court for the Western District of Texas on five counts of forging border crossing cards of nonresident aliens, in violation of 18 U.S.C. 1426(a). After a jury trial, he was convicted on four counts and acquitted by the court on the remaining count. On appeal, the court of appeals reversed, concluding that the district court had committed reversible error by admitting into evidence 32 border crossing cards relating to crimes not charged in the indictment (Pet. App. D1-31; 639 F.2d 1327). Following the remand, the prosecutor obtained a superseding indictment on June 17, 1981, which charged

not only the substantive offenses on which petitioner had been convicted, but also charged that petitioner had engaged in a conspiracy to forge border crossing cards, in violation of 18 U.S.C. 371. The forgeries of the 32 border crossing cards were alleged as overt acts in the conspiracy.

On July 28, 1981, following an evidentiary hearing, the district court sustained petitioner's motion to dismiss the indictment on the ground of vindictive prosecution (Pet. App. C1-C18). In its findings of fact, the district court acknowledged that the government was not concerned with increasing the amount of punishment to which petitioner would be exposed but that its primary, if not sole, purpose was to overcome the objection of the court of appeals to the introduction of the 32 extraneous forgeries. Nonetheless, it found that the government had failed to carry its burden of demonstrating a lack of vindictiveness because it was attempting to deprive petitioner of the fruit of his successful appeal. A panel of the court of appeals affirmed (Pet. App. B1-B64; 693 F.2d 1221). The court granted the government's petition for rehearing en banc and, by a vote of 11-2, reversed the order dismissing the conspiracy count of the indictment (Pet. App. A1-A56; 718 F.2d 1360).

Petitioner contends (Pet. 11-29) that the conspiracy count of the indictment was correctly dismissed because a presumption of vindictiveness arose from the prosecutor's addition of the conspiracy charge and was not overcome by the prosecutor's justification for adding the charge. Whatever the merits of petitioner's contentions, they are not now ripe for review by this Court.[1] The court of appeals' decision

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[1]It is now more than three years since the return of the original indictment, more than thirty-one months since the return of the superseding indictment, and more than thirty months since the district court's dismissal order. Further interlocutory review at this time would cause additional delay in trial of the charges against petitioner.

places petitioner in precisely the same position he would have occupied if the district court had refused to exclude the evidence. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1984

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[2]Because this case is interlocutory, we are not responding on the merits of the questions presented by the petition. We will file a response on the merits if the Court requests.

83 - 1115

No. 83-1117

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HERMAN V. KREZDORN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

This reply is being filed for the sole purpose of correcting several highly misleading assertions by the Respondent United States in its brief "Memorandum" in opposition to Petitioner's petition for writ of certiorari.

1. The United States asserts that Petitioner's contentions "are not ripe for review by this Court." (Mem., p.2) That is absolutely false. This interlocutory appeal was initiated *by the United States* from the district court's dismissal of the conspiracy count against Petitioner. Any delay in the trial of the charges against Petitioner is entirely due to (a) the United States adding a conspiracy charge against Petitioner for the first time in the superseding indictment following his successful appeal from his forgery convictions, and (b) the United States appealing the district court's pre-trial dismissal of the conspiracy charge.

2. The United States asserts that the Fifth Circuit's en banc decision "places petitioner in precisely the same position he would have occupied if the district court had refused to exclude the evidence." (Mem., p.3) That, too, is erroneous, and reflects either a misunderstanding or a misrepresentation as to the posture of this case.

First of all, this is not an appeal from the granting of a motion to suppress or exclude evidence; this appeal involves the dismissal of an entire conspiracy count of an indictment.

Second, and more importantly, at the conclusion of Petitioner's first trial, at which the evidence of extraneous forgeries was improperly admitted, Petitioner stood convicted of four counts of forging border-crossing cards. At that time, he had not even been *charged* with

conspiracy. Only *after* Petitioner obtained an appellate reversal of the forgery convictions did the United States elect to add the conspiracy count in the superseding indictment.

No trial has even been had on the charges alleged in the superseding indictment. That is because the district court dismissed the conspiracy count on the grounds of prosecutorial vindictiveness, and the United States filed this interlocutory appeal from that dismissal. But if the Fifth Circuit's en banc decision reversing that dismissal is allowed to stand, Petitioner very clearly will *not* be in the "same position" of facing the four forgery counts, but rather he will be facing those four counts *plus* the new conspiracy count.

3. The United States asserts that if this Court denies certiorari, and Petitioner is convicted of conspiracy and the conviction is affirmed, Petitioner "will then be able to present his contentions to this Court . . ." (Mem., p.3) Again, the assertion is plainly false and misleading. As this case now stands, the Fifth Circuit has held that the post-appeal addition of the conspiracy count against Petitioner is not barred by the doctrine of prosecutorial vindictiveness or the rule of *Blackledge* v. *Perry*, 417 U.S. 21 (1974). If this Court refuses to review that holding, it is very likely—and surely the United States will take the position—that subsequent appellate review will be precluded by virtue of the doctrines of *stare decisis* and the law of the case.

In short, Petitioner's contentions are clearly ripe for review at this time. Petitioner again urges that this Court should grant his petition for writ of certiorari.

Respectfully submitted,

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